(28,758)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 299.

W. I. PORTERFIELD AND Y. MIZUNO, APPELLANTS,

vs.

U. S. WEBB, AS ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, AND THOMAS LEE WOOLWINE, AS DISTRICT ATTORNEY OF THE COUNTY OF LOS ANGELES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 16, 1922.

a *Citation.*

UNITED STATES OF AMERICA, *ss:*

To U. S. Webb, as Attorney General of the State of California, and Thomas Lee Woolwine, as District Attorney of the County of Los Angeles, State of California, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, D. C., within thirty days from the date hereof, pursuant to an appeal filed in the United States District Court, Southern District of California, Southern Division, at Los Angeles, wherein W. L. Porterfield and Y. Mizuno are appellants and you the said U. S. Webb, as Attorney General of the State of California, and Thomas Lee Woolwine, as District Attorney of the County of Los Angeles, State of California, are appellees, to show cause, if any there be, why the order denying the appellants' application for an interlocutory injunction as in that appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Joseph McKenna, Associate Justice of the Supreme Court of the United States, this 8 day of February, in the year of our Lord one thousand nine hundred and twenty-two.

JOSEPH McKENNA,
Associate Justice of the Supreme Court of the United States.

b [Endorsed:] F 61 Eq. United States Supreme Court. W. L. Porterfield and Y. Mizuno, Appellants, against U. S. Webb, as Attorney General of the State of California, and Thomas Lee Woolwine, as District Attorney of the County of Los Angeles, State of California, Appellees. Original Citation. Louis Marshall, Attorney for Appellants, 120 Broadway, New York City. Filed Feb. 17, 1922. Chas. N. Williams, Clerk, by R. S. Zimmerman, Deputy Clerk.

1 United States District Court, Southern District of California, Southern Division, at Los Angeles.

In Equity.

Equity. No. —.

W. L. PORTERFIELD and Y. MIZUNO, Plaintiffs,

vs.

U. S. WEBB, as Attorney-General of the State of California, and Thomas Lee Woolwine, as District Attorney of the County of Los Angeles, State of California, Defendants.

Bill of Complaint.

To the Honorable the judges of the District Court of the United States for the Southern District of California, sitting in Equity:

W. L. Porterfield, a citizen of the United States, and of the state of California, and a resident of the Southern District of California, and Y. Mizuno, a subject of the Emperor of Japan, and a resident of the Southern District of California, bring this their bill of complaint against U. S. Webb, as Attorney-General of the State of California, and Thomas Lee Woolwine as District Attorney of the County of Los Angeles, state of California, each of whom are citizens of the state of California and said Thomas Lee Woolwine is a resident of the Southern District of the state of California and of the city of Los Angeles, and respectfully shows unto your honors as follows:

I.

That plaintiffs suing on behalf of themselves and all others similarly situated, bring this bill of complaint against said U. S. Webb as the duly elected, qualified and acting Attorney-
2 General of the state of California, and Thomas Lee Woolwine, as the duly elected, qualified and acting District Attorney of the County of Los Angeles, State of California.

II.

That the value of the matter in dispute herein between each plaintiff and defendants exceeds the sum of $3,000.00 exclusive of interest and costs.

III.

That the jurisdiction of this honorable court is invoked and exists because and by reason of the federal question involved in this suit, in that, the controversy is one arising under the constitution and

laws of the United States, and to avoid a multiplicity of suits and involves the construction and interpretation of a treaty made by the government of the United States and the empire of Japan, and because plaintiffs have no adequate remedy at law.

IV.

That the plaintiff, Porterfield, is now and for a number of years has been the owner of the following described real estate lying and being in Los Angeles County, State of California, to wit: being the North one-half of the Southeast one quarter of section 26, township 1. N., Range 9 West, and containing eighty (80) acres of land.

That said real estate is particularly adapted to raising vegetables, and for a number of years last past has been, and is now being devoted to that and agricultural purposes. That the plaintiff Mizuno is a capable farmer and is in all respects a desirable person to become a tenant of said real estate. That the plaintiff Porterfield desires to lease said real estate to the plaintiff Mizuno for the period of five years, and the plaintiff Mizuno desires to accept such lease, and but for the act hereinafter specifically mentioned, the
3 plaintiffs would execute a lease of said real estate from the plaintiff Porterfield to the plaintiff Mizuno for a period of five years from this date.

V.

That said plaintiff Mizuno, in addition to being a capable farmer, is engaged in the business of trading, wholesale and retail, in farm products, and, instead of purchasing such farm products, he desires to produce his own farm products for the purpose of selling them in the wholesale and retail trade, and if he is prevented from leasing land for the purpose of producing such farm products for such trade, he will be prevented from engaging in trade and the incidents to trade as he is authorized so to do under the treaty hereinafter mentioned.

VI.

That on or about the 20th day of November, 1920, the people of the State of California, at a general election, attempted to adopt an act known as the "alien land law," said act being entitled,

"An act relating to the rights, powers and disabilities of aliens and of certain companies, associations and corporations with respect to property in this state, providing for escheats in certain cases, prescribing the procedure therein, requiring reports of certain property holdings to facilitate the enforcement of this act, prescribing penalties for violation of the provisions hereof, and repealing all acts or parts of acts inconsistent or in conflict herewith." being act No. 156.

That the defendants, U. S. Webb, as the Attorney-General of the State of California, and Thomas Lee Woolwine, as the District-

Attorney of the County of Los Angeles, said state, each have threatened to, and will enforce said act in each and all of its terms, and the whole thereof, and particularly against the plaintiffs in the event that they enter into a lease of said real estate, for the purpose and terms aforesaid, and will forfeit or attempt to forfeit such
4 leasehold interest to the state of California, and will prosecute these plaintiffs criminally for an alleged violation of said act, above mentioned, and the said act is in its terms so drastic, and the penalties attached to a violation of the terms thereof are so great, that neither of these plaintiffs may make or execute such lase, even for the purpose of testing the constitutionality and validity of said act above mentioned, and unless this Court shall determine the validity of said act in this proceeding, said plaintiffs will be compelled to submit to said act whether the same be valid or invalid, and thereby be deprived of their property without due process of law and denied the equal protection of the law in contravention of the fourteenth amendment to the federal constitution, and the plaintiffs have no adequate remedy at law, but are relievable only in a court of equity.

VIII.

That said act, above mentioned, is violative of the rights of the plaintiffs under the constitution of the United States, in that it denies to them the equal protection of the laws, and deprives them of property without due process of law which is guaranteed by section one of the fourteenth amendment to said constitution to all persons submitting themselves to the jurisdiction of the United States whether citizens or aliens.

IX.

That said act, above mentioned, is in conflict with, repugnant to and violates section 1977 of the Revised Statutes of the United States.

X.

That said act is in conflict with, repugnant to, and violates section 2164 of the Revised Statutes of the United States.

XI.

That said act is invalid for the further reason that it is
5 unreasonable, arbitrary, oppressive, capricious, inequable, unjust, and made to depend on a difference of race.

XII.

That said act, is, in the penalties prescribed for its violation, so drastic, that no owner of real estate, or of any interest therein, could invoke the jurisdiction of any court to test the validity thereof, except at the risk of confiscation of his property and imprisonment for long terms in jails or penitentiaries, and, the payment of enormous

fines, and, for this reason said act denies to the plaintiffs and all others so situated, the equal protection of the laws and deprives them of property without due process of law.

XIII.

That said act is invalid for the reason it is in violation of and repugnant to the treaty between the United States of America and the Empire of Japan.

XIV.

That if plaintiffs are not permitted to enter into a lease, of said real estate, as aforesaid, and on the terms above mentioned, a large and irreparable loss will occur to them and each of them, and the plaintiffs have no adequate remedy at law, but are relievable only in a court of equity.

Inasmuch as plaintiffs and each of them have no adequate remedy in the premises by the strict rules of law and can obtain relief only in a court of equity where matters and things of the kind and character hereinbefore stated are perfectly cognizable and relievable, and to the end that they and each of them may have relief which they and each of them can only obtain in a court of equity, they and each of them pray:

(1) That U. S. Webb, as Attorney-General of the state of California, and Thomas L. Woolwine, as District Attorney of the
6 County of Los Angeles, State of California, and each of them, be enjoined and restrained, provisionally, preliminarily, and perpetually by the order and injunction of this court from bringing directly or indirectly, and from permitting to be brought, directly or indirectly, any proceedings at law or in equity for the purpose of enforcing said act above mentioned, against these plaintiffs or either of them upon executing or attempting to execute a lease of real estate above mentioned for the above mentioned term, or any other person or corporation similarly situated and from causing the plaintiffs or either of them or any other person or corporation similarly situated, to be arrested for violating the terms and provisions of said act, and from taking any other action in any other manner to prevent or interfere with the plaintiffs or either of them from executing and delivering such lease on said real estate, and that an order to show cause issue herein upon application of the plaintiffs herein directed to the above named defendants requiring them to show cause why a temporary injunction should not issue as prayed for herein, and that a temporary restraining order may issue pending the hearing of said show cause order.

(2) That upon the hearing, the aforesaid act be declared to be unconstitutional, illegal and void, and that a perpetual injunction be issued restraining the enforcement thereof as hereinabove prayed for.

(3) That a writ of subpœna may issue to said defendants requiring them to answer this bill of complaint and to abide and perform such order and decree in the premises as to the court shall seem proper and required by the principles of equity and good conscience.

D. B. CHAPIN,
ALBERT H. ELLIOT,
LEE R. TAYLOR,
JAS. L. KING,
Solicitors for Plaintiffs.

7 STATE OF CALIFORNIA,
County of Los Angeles, ss:

W. L. Porterfield and Y. Mizuno, each being first duly sworn, on oath deposes and says for himself: I am one of the plaintiffs named in the foregoing bill of complaint; I have read the foregoing bill of complaint, and know the contents thereof, and the same is true of my own knowledge.

W. L. PORTERFIELD.
Y. MIZUNO.

Subscribed and sworn to before me this 18th day of October, 1921.
[SEAL.]
R. T. CHAPIN,
Notary Public in and for the County of Los Angeles, State of California.

(Endorsed:) (Original) Equity No. F 61 United States District Court, Southern District of California Southern Division at Los Angeles. W. L. Porterfield and Y. Mizuno, Plaintiffs, vs. U. S. Webb as Attorney General of the State of California et al., Defendants. Bill of Complaint. Filed Oct. 18, 1921, Chas. N. Williams, Clerk, by R. S. Zimmerman, Deputy Clerk. Law Offices Chapin, Taylor & King, Suite 414–418 Douglas Bldg. Telephone 61043 Los Angeles, California.

8 United States District Court, Southern District of California, Southern Division, at Los Angeles.

In Equity.

Equity. No. —.

No. —.

W. L. PORTERFIELD and Y. MIZUNO, Plaintiffs,

vs.

U. S. WEBB, as Attorney-General of the State of California, and Thomas Lee Woolwine, as District Attorney of the County of Los Angeles, State of California, Defendants.

Motion for Temporary Injunction.

Now come the above named plaintiffs and upon their verified bill of complaint herein move the Court for a temporary injunction re-

straining the above named U. S. Webb as Attorney-General of the State of California and Thomas Lee Woolwine as District Attorney of the county of Los Angeles, state of California, during the pendency of the above entitled action from bringing, directly or indirectly, and from permitting to be brought, directly or indirectly, any proceedings at law or in equity for the purpose of enforcing the act passed by the people of the state of California, entitled,

"An act relating to the rights, powers and disabilities of aliens and of certain companies, associations and corporations with respect to property in this state, providing for escheats in certain cases, prescribing the procedure therein, requiring reports of certain property holdings to facilitate the enforcement of this act, prescribing penalties for violation of the provisions hereof, and repealing all acts or parts of acts inconsistent or in conflict herewith." Being act No. 156.

against these plaintiffs or either of them upon their executing or attempting to execute a lease for the real estate described in the bill of complaint herein, upon the terms therein mentioned, or any
9 other person or corporation similarly situated, and from causing the plaintiffs or either of them or any other person or corporations, similarly situated to be arrested for violating the terms and provisions of said act, and from taking any other action in any other manner to prevent or interfere with the plaintiffs or either of them from executing and delivering a lease as described in the bill of complaint on the real estate of said bill of complaint mentioned.

D. B. CHAPIN,
ALBERT H. ELLIOT,
LEE R. TAYLOR,
JAS. L. KING,
Solicitors for Plaintiffs.

(Endorsed:) Equity No. F 61 United States District Court, Southern District of California Southern Division at Los Angeles. W. L. Porterfield and Y. Mizuno, Plaintiffs, vs. U. S. Webb as Attorney-General of the State of California, et al., Defendants. Motion for Temporary Injunction. Filed Oct. 18, 1921. Chas. N. Williams, Clerk, by R. S. Zimmerman, Deputy Clerk. Law Offices Chapin, Taylor & King, Suite 414-418 Douglas Bldg. Telephone 61043 Los Angeles, California.

10 United States District Court, Southern District of California, Southern Division, at Los Angeles.

Equity. No. —.

W. L. PORTERFIELD and Y. MIZUNO, Plaintiffs,

vs.

U. S. WEBB, as Attorney-General of the State of California, and Thomas Lee Woolwine, as District Attorney of the County of Los Angeles, State of California, Defendants.

Order.

The Court, having considered the verified bill of complaint, duly filed in the above entitled suit, and the motion of the plaintiffs for a temporary injunction therein, and it appearing to the Court that the suit is one requiring the presence at the hearing of the application for a temporary injunction of three judges, one of whom shall be a circuit judge of the United States,

It is by the court ordered that the application for such temporary injunction be heard on the 10th day of November, 1921, at ten o'clock in the forenoon in the United States District Court at the Court House thereof in the city of Los Angeles, Los Angeles County, State of California.

Dated this 20 day of October, 1921. BLEDSOE,
U. S. District Judge.

(Endorsed:) Equity No. F 61 United States District Court, Southern District of California Southern Division at Los Angeles. W. L. Porterfield and Y. Mizuno, Plaintiffs, vs. U. S. Webb as Attorney General of the State of California, et al., Defendants. Order fixing time for hearing. Filed Oct. 20, 1921. Chas. N. Williams, Clerk, by R. S. Zimmerman, Deputy Clerk. Law Offices Chapin, Taylor & King, Suite 414-418 Douglas Bldg., Telephone 61043 Los Angeles, California.

11 At a stated term, to wit, the July, A. D., 1921, term of the District Court of the United States of America within and for the Southern Division of the Southern District of California held at the court room thereof, in the city of Los Angeles, on Monday, the nineteenth day of December, in the year of our Lord one thousand nine hundred and twenty-one.

Present: The Honorable Benjamin F. Bledsoe, District Judge.

No. F-61. Eq., S. D.

W. T. PORTERFIELD et al., Plaintiff-,

vs.

U. S. WEBB, Defendant.

This cause having been heard at San Francisco, California, by Hon. Wm. H. Hunt, United States Circuit Judge, Honorable Ben-

jamin F. Bledsoe and Honorable M. T. Dooling, United States District Judges, sitting in banc, and said cause having been submitted and it appearing that the Opinion of said Hon. M. T. Dooling has been filed herein in which this court concurs; now, it is ordered that the application for injunction be and it hereby is denied in accordance with opinion of said Judge Dooling filed herein.

12 In the United States District Court, Southern District of California, Southern Division, at Los Angeles.

In Equity.

No. F-61.

W. L. PORTERFIELD and Y. MIZUNO, Plaintiffs,

vs.

U. S. WEBB, as Attorney General of the State of California, and Thomas Lee Woolwine, as District Attorney of the County of Los Angeles, State of California, Defendants.

On Application for a Preliminary Injunction.

Before Hon. Wm. H. Hunt, Circuit Judge, and Hon. Benj. F. Bledsoe and Hon. M. T. Dooling, District Judges.

DOOLING, *District Judge:*

The bill of complaint herein avers that the plaintiff Porterfield is a citizen of the United States, and the plaintiff Mizuno a subject of the Emperor of Japan lawfully residing in the State of California. Porterfield is the owner of 80 acres of land particularly adapted to raising vegetables which he desires to lease to Mizuno and which Mizuno desires to rent from him for a period of five years, but they are prevented from entering into such lease because of the provisions of the Act adopted at the election in November, 1920, known as the "California Alien Land Law," and the threat on the part of the defendants U. S. Webb, Attorney General, and Thomas Lee Woolwine, District Attorney, to enforce said act in all of its terms against them if the desired lease is executed. This action is brought to restrain such enforcement. It is claimed that the Act violates certain provisions of the Constitution of the United States, and is in conflict with treaty guarantees and with certain named Sections of the Revised Statutes.

13 The Act provides in Sections 1 and 2 as follows:

"Section 1. All aliens eligible to citizenship under the laws of the "United States may acquire, possess, enjoy, transmit and inherit real "property, or any interest therein, in this state, in the same manner "and to the same extent as citizens of the United States, except as "otherwise provided by the laws of this state."

"Sec. 2. All aliens other than those mentioned in section one of "this act may acquire, possess, enjoy and transfer real property, or "any interest therein, in this state, in the manner and to the extent "and for the purpose prescribed by any treaty now existing between "the government of the United States and the nation or country of "which such alien is a citizen or subject, and not otherwise."

Other sections provide penalties by escheat and imprisonment for its violation. It will readily be seen that the act itself violates no treaty provision because Section 2 thereof expressly protects aliens not eligible to citizenship in their relation to real property to the extent and for the purpose prescribed by any treaty between the United States and their own Country, so that whatever is guaranteed by such treaty is excluded from the operation of the Act. The leasehold interest intended to be conveyed by Porterfield to Mizuno is an interest in agricultural land, and there is nothing in the treaty with Japan that secures to Japanese subjects resident in this Country the right to acquire, possess or enjoy agricultural land or any interest therein. The Constitutional, statutory and treaty provisions involved in this action were considered at length by Circuit Judge Gilbert and District Judges Cushman and Neterer in the recent case of Terrace et al., vs. Thompson, 274 Fed. 841, upon an application for a temporary injunction to restrain the Attorney General of the State of Washington from enforcing a Statute of that State of the same general character as the law of California now under consideration.

The plaintiffs in that case advanced, urged and argued practically the same contentions that are made by plaintiffs here, all of which were rejected by the Court. As we fully agree with the reasoning and conclusions in the Terrace Case it is unnecessary for us to restate them, or to go over them in detail. It is urged, however, that this case differs from the Terrace Case in that the Washington law excludes from ownership of land all aliens except those who have in good faith declared their intention to become citizens, while the California law excludes only such aliens as are ineligible to citizenship and that the designation of this limited class is arbitrary, unreasonable, unwarranted and therefore invalid. Or, as stated by counsel, the Legislature cannot take what might be termed a natural class of persons (i. e. aliens) split that class in two, and there arbitrarily designate the dissevered fragments of the original unit as two classes; and thereupon enact different rules for the government of each. As a matter of fact, however, the Washington law does split up the natural class of persons (aliens) into aliens who have, and aliens who have not in good faith declared their intention to become citizens of the United States, and enacted different rules for the government of each, in that the former may, and the latter may not own land.

It is true that Congress has the power arbitrarily to say who may be naturalized and that exercising such power it has limited the right of naturalization to "aliens" being free white persons; and to aliens of African "nativity and to persons of African descent." This limitation excludes three of the five great races of the world, the

yellow, the brown and the red. And while such exclusion is in a sense arbitrary, it is not without foundation in reason, and has been in effect, except for a brief period, practically during the existence of our government. In any event, once established, however
15 arbitrarily, and so long as it continues, it furnishes a fundamental and important distinction which may well be adopted by a state in determining who may not own land within its borders. That fact was clearly recognized by the Court and given expression in the Terrace case in the following language:

"It is obvious that one who is not a citizen and cannot become "one lacks an interest in, and the power to effectually work for the "welfare of the State, and, so lacking, the State may rightfully deny "him the right to own and lease real estate within its boundaries. "If one incapable of citizenship may lease or own real estate, it is "within the realm of possibility that every foot of land within the "State might pass to the ownership or possession of noncitizens. "Such a result would leave the foundation of the State but a pale "shadow, and the structure erected thereon but a Tower of Babel "from which the tenants in possession might, when the shock of "war came, bow themselves out because they were not bound as citi-"zens to defend the house in which they lodged."

If there be anything in the case of Ah Chung, 2 Fed. 733, which may be held to prohibit a state from lawfully preventing persons ineligible to citizenship from owning land therein, to that extent we are not disposed to follow it.

The application for a preliminary injunction is denied.

(Endorsed:) Original No. F-61. In Equity. In the United States District Court, Southern District of California, Southern Division, at Los Angeles. W. L. Porterfield and Y. Mizuno, Plaintiffs, vs. U. S. Webb, as Attorney General of the State of California, et al., Defendants. Opinion and order denying application for a preliminary injunction. Filed Dec. 19, 1921. Chas. N. Williams, Clerk, by Wm. U. Handy, Deputy Clerk.

16 Supreme Court of the United States.

W. L. Porterfield and Y. Mizuno, Appellants,

against

U. S. Webb, as Attorney General of the State of California, and Thomas Lee Woolwine, as District Attorney of the County of Los Angeles, State of California, Appellees.

Petition for Appeal.

Now come W. L. Porterfield and Y. Mizuno, by Louis Marshall, their attorney, and say that this action was brought in the United States District Court, Southern District of California, Southern Division, at Los Angeles, for the purpose of enjoining the defendants,

who are, respectively, the Attorney General of the State of California and the District Attorney of the County of Los Angeles, in the State of California, from enforcing the so-called California Anti-Alien Land Law, adopted by initiative November 2, 1920, on the ground of its unconstitutionality.

An application was made for an interlocutory injunction restraining the enforcement of said statute before Honorable William H. Hunt, Circuit Judge, and Honorable Benjamin F. Bledsoe and Honorable M. T. Dooling, District Judges, on the 19 day of December, 1921, decision was rendered denying your petitioners' application for the interlocutory injunction so prayed for. They contend that in denying the said application for an injunction certain errors were committed to their prejudice, all of which will in more detail appear from the Assignments of Error filed with this Petition.

Wherefore, your petitioners pray, pursuant to Section 266 of the Judicial Code, that they may be allowed to appeal to the Supreme Court of the United States for the correction of the errors and a reversal of the order and decision so complained of; that a transcript of the record, proceedings and orders in this cause, duly authenticated, be sent to the Supreme Court of the United States; that the amount of the security which the petitioners shall give and furnish on said appeal may be fixed, and that upon the giving of such security all further proceedings in the United States District Court, Southern District of California, Southern Division, at Los Angeles, be suspended and stayed until the determination of said appeal by the Supreme Court of the United States.

Dated, February 1, 1922.

W. L. PORTERFIELD,
Y. MIZUNO, *Petitioners,*
By LOUIS MARSHALL,
Their Attorney and Counsel.

(Endorsed:) F. 61 Eq. United States Supreme Court. W. L. Porterfield and Y. Mizuno, Appellants, against U. S. Webb, as Attorney General of the State of California, and Thomas Lee Woolwine, as District Attorney of the County of Los Angeles, State of California, Appellees. Original Petition for Appeal. Louis Marshall, Attorney for Appellants, 120 Broadway, New York City. Filed Feb. 17, 1922. Chas. N. Williams, Clerk. By R. S. Zimmerman, Deputy Clerk.

18 Supreme Court of the United States.

W. L. PORTERFIELD and Y. MIZUNO, Appellants,
against
U. S. WEBB, as Attorney General of the State of California, and Thomas Lee Woolwine, as District Attorney of the County of Los Angeles, State of California, Appellees.

Allowance of Appeal.

Come now W. L. Porterfield and Y. Mizuno, appellants above named, on this 8th day of February, 1922, and file and present

their petition praying for the allowance of an appeal intended to be urged by them, and praying further that a duly authenticated transcript of the record, proceedings and papers upon which the judgment herein was rendered may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had in the premises as may be just and proper.

And it appearing upon a consideration of such petition that in this action there has been drawn in question the validity of a statute of and authority exercised under the State of California on the ground of their being repugnant to the Constitution of the United States, and that a decision rendered by the United States District Court, Southern District of California, Southern Division, at Los Angeles, upon application for an injunction pursuant to Section 266 of the Judicial Code was in favor of the validity of a statute of and of an authority exercised under the State of California.

It is ordered that the said appeal to the Supreme Court of the United States from the order denying the interlocutory injunction prayed for by the petitioners be allowed as prayed; provided, however, that W. L. Porterfield and Y. Mizuno, the petitioners,
19 give bond according to law in the sum of Two hundred and fifty Dollars ($250), which said bond shall operate as a supersedeas bond.

In Testimony Whereof, witness my hand this 8th day of February, 1922.

JOSEPH McKENNA,
Associate Justice of the Supreme Court of the United States.

(Endorsed:) F. 61 Eq. United States Supreme Court. W. L. Porterfield and Y. Mizuno, Appellants, against U. S. Webb, as Attorney General of the State of California, and Thomas Lee Woolwine, as District Attorney of the County of Los Angeles, State of California, Appellees. Original. Allowance of Appeal. Filed Feb. 17, 1922. Chas. N. Williams, Clerk, by R. S. Zimmerman, Deputy Clerk. Louis Marshall, Attorney for Appellants, 120 Broadway, New York City.

20 Supreme Court of the United States.

W. L. PORTERFIELD and Y. MIZUNO, Appellants,

against

U. S. WEBB, as Attorney General of the State of California, and Thomas Lee Woolwine, as District Attorney of the County of Los Angeles, State of California, Appellees.

Assignments of Error.

Now come W. L. Porterfield and Y. Mizuno, appellants in the above entitled cause, by Louis Marshall, their attorney, and say that in the record and proceedings in this cause there is manifest error in this, to wit:

First. In that the United States District Court, Southern District of California, Southern Division, erred in adjudging that the so-called California Anti-Alien Land Law, adopted by initiative on November 2, 1920, is a constitutional act.

Second. In that the United States District Court, Southern District of California, Southern Division, erred in adjudging that the so-called California Anti-Alien Land Law, adopted by initiative on November 2, 1920, did not deprive the appellant Porterfield of his liberty without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Third. In that the United States District Court, Southern District of California, Southern Division, erred in adjudging that the so-called California Anti-Alien Land Law, adopted by initiative November 2, 1920, did not deprive the appellant Porterfield of his property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

21 Fourth. In that the United States District Court, Southern District of California, Southern Division, erred in adjudging that the so-called California Anti-Alien Land Law, adopted by initiative November 2, 1920, did not deny the appellant Porterfield the equal protection of the laws in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Fifth. In that the United States District Court, Southern District of California, Southern Division, erred in adjudging that the so-called California Anti-Alien Land Law, adopted by initiative November 2, 1920, did not deprive the appellant Mizuno of the equal protection of the laws in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Sixth. In that the United States District Court, Southern District of California, Southern Division, erred in adjudging that the so-called California Anti-Alien Land Law, adopted by initiative November 2, 1920, did not deprive the appellant Mizuno of the liberty of pursuit of a lawful occupation, to wit, that of agriculture under a lease of land located in California, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Seventh. In that the United States District Court, Southern District of California, Southern Division, erred in adjudging that the so-called California Anti-Alien Land Law, adopted by initiative November 2, 1920, did not deprive the appellant Mizuno, who is a subject of the Empire of Japan, of the rights, privileges and immunities secured to him under the treaty between the United States of America and the Empire of Japan.

22 Eighth. In that the United States District Court, Southern District of California, Southern Division, erred in adjudging that the Fourteenth Amendment to the Constitution of the United States did not give to the appellant Porterfield, who is a citizen of the United States, the right to lease land belonging to him in the State of California to the appellant Mizuno, who is an alien of the

Japanese race and not a free white person or of African Nativity or of African descent.

Ninth. In that the United States District Court, Southern District of California, Southern Division, erred in adjudging that the Fourteenth Amendment to the Constitution of the United States did not give to the appellant Mizuno, who is an alien of the Japanese race and not a free white person and not of African nativity or of African descent, the right to acquire, possess and enjoy an interest in real property in the State of California under a lease thereof for a term of years.

Tenth. In that the United States District Court, Southern District of California, Southern Division, erred in refusing to decide that the so-called California Anti-Alien Land Law, adopted by initiative November 2, 1920, is unconstitutional and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that it discriminated against the appellant Mizuno on the ground of color, race and nationality.

Eleventh. In that the United States District Court, Southern District of California, Southern Division, erred in refusing to decide that the so-called California Anti-Alien Land Law, adopted by initiative November 2, 1920, is an unconstitutional act.

23 Twelfth. In that the United States District Court, Southern District of California, Southern Division, erred in refusing to decide that the so-called California Anti-Alien Land Law, adopted by initiative November 2, 1920, deprived the appellant Porterfield of his liberty without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Thirteenth. In that the United States District Court, Southern District of California, Southern Division, erred in refusing to decide that the so-called California Anti-Alien Land Law, adopted by initiative November 20, 1920, deprived the appellant Porterfield of his property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Fourteenth. In that the United States District Court, Southern District of California, Southern Division, erred in refusing to decide that the so-called California Anti-Alien Land Law, adopted by initiative November 2, 1920, denied the appellant Porterfield the equal protection of the laws in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Fifteenth. In that the United States District Court, Southern District of California, Southern Division, erred in refusing to decide that the so-called California Anti-Alien Land Law, adopted by initiative November 2, 1920, deprived the appellant Mizuno of the equal protection of the laws in violation of Section 1 of the Fourteenth Amendment to the Consti-tion of the United States.

Sixteenth. In that the United States District Court, Southern District of California, Southern Divsion, erred in refusing

24 to decide that the so-called California Anti-Alien Land Law, adopted by initiative November 2, 1920, deprived the appellant Mizuno of the liberty of pursuit of a lawful occupation, to wit, that of agriculture under a lease of land located in California, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Seventeenth. In that the United States District Court, Southern District of California, Southern Division, erred in refusing to decide that the so-called California Anti-Alien Land Law, adopted by initiative November 2, 1920, deprived the appellant Mizuno, who is a subject of the Empire of Japan, of the rights, privileges and immunities secured to him under the treaty between the United States of America and the Empire of Japan.

Eighteenth. In that the United States District Court, Southern District of California, Southern Division, erred in refusing to decide that the Fourteenth Amendment to the Constitution of the United States gave to the appellant Porterfield, who is a citizen of the United States, the right to lease land belonging to him in the State of California to the appellant Mizuno, who is an alien of the Japanese race and not a free white person or of African nativity or of African descent.

Nineteenth. In that the United States District Court, Southern District of California, Southern Division, erred in refusing to decide that the Fourteenth Amendment to the Constitution of the United States gave to the appellant Mizuno, who is an alien of the Japanese race and not a free white person and not of African Nativity or of African descent, the right to acquire, possess and enjoy an interest in real property in the State of California under a lease thereof for a term of years.

25 Wherefore, for these and other manifest errors appearing in the record, W. L. Porterfield and Y. Mizuno, the appellants, pray that the order rendered by the United States District Court, Southern District of California, Southern Division, at Los Angeles, denying the application for a preliminary injunction made by the appellants, be reversed and set aside and held for naught, and that judgment be rendered for the appellants herein granting to them their rights under the laws and Constitution of the United States of America and the treaty between the United States of America and the Empire of Japan, and particularly judgment for the relief demanded in their bill of complaint in this cause.

LOUIS MARSHALL,
Attorney for Appellants.

(Endorsed:) F. 61 Eq. United States Supreme Court. W. L. Porterfield and Y. Mizuno, Appellants, against U. S. Webb, as Attorney General of the State of California, and Thomas Lee Woolwine, as District Attorney of the County of Los Angeles, State of California, Appellees. Original Assignments of Error. Louis Marshall Attorney for Appellants, 120 Broadway, New York City. Filed

Feb. 17, 1922. Chas. N. Williams, Clerk, by R. S. Zimmerman, Deputy Clerk.

26 Supreme Court of the United States.

W. L. PORTERFIELD and Y. MIZUNO, Appellants,

against

U. S. WEBB, as Attorney General of the State of California, and Thomas Lee Woolwine, as District Attorney of the County of Los Angeles, State of California, Appellees.

Bond on Appeal.

Know all men by these presents, that we, W. L. Porterfield and Y. Mizuno, appellants, as principals, and Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto U. S. Webb, as Attorney General of the State of California, and Thomas Lee Woolwine, as District Attorney of the County of Los Angeles, State of California, in the full sum of Two hundred and fifty Dollars ($250), to be paid to the said U. S. Webb and Thomas Lee Woolwine, and for the payment of which well and truly to be made we bind ourselves and each of us and each of our successors, heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated the 1st day of February, 1922.

Whereas the above named W. L. Porterfield and Y. Mizuno, appellants, seek to prosecute their appeal in the Supreme Court of the United States to reverse the order denying the appellants' application for an interlocutory injunction in the action entitled W. L. Porterfield and Y. Mizuno against U. S. Webb, as Attorney General of the State of California, and Thomas Lee Woolwine, as District Attorney of the County of Los Angeles, State of California, rendered by the United States District Court, Southern District of California, Southern Division, at Los Angeles, on the 19 day of December, 1921.

Now, therefore, the condition of the above obligation is
27 such that if the above named appellants shall prosecute their appeal to effect and shall answer all costs and damages that may be adjudged if they shall fail to make good their plea, then this obligation is to be void, otherwise to remain in full force and virtue.

W. L. PORTERFIELD, [SEAL.]
Y. MIZUNO, [SEAL.]
By LOUIS MARSHALL,
Their Attorney and Counsel.

[SEAL.] FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
By JOHN W. WHITBECK,
Attorney-in-Fact.

Attest:
ERNEST L. HICKS,
Attorney-in-Fact.

This bond is approved this 8th day of February, 1922.

JOSEPH McKENNA,
Associate Justice of the Supreme Court of the United States.

28 Form No. 105 Revised.

STATE OF NEW YORK,
County of New York, ss:

On the 1st day of February, in the year 1922, before me personally came John W. Whitbeck, to me known, who, being by me duly sworn, did depose and say that he resides in the City of New York; that he is the Attorney-in-Fact of the Fidelity and Deposit Company of Maryland, the corporation described in, and which executed the within instrument; that he knows the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order; and that the Fidelity and Deposit Company of Maryland has been duly authorized to transact business in the State of New York, in pursuance of the statutes in such case made and provided; and that the liabilities of said Company do not exceed its assets as ascertained in the manner provided in Section 183, of the Insurance Law, constituting Chapter 33 of the Consolidated Laws of the State of New York. And the said John W. Whitbeck further said that he is acquainted with Ernest L. Hicks and knew him to be the Attorney-in-Fact of said Company; that the signature of the said Ernest L. Hicks subscribed to the within instrument, was in the genuine handwriting of the said Ernest L. Hicks and was subscribed thereto by like order of the Board of Directors, and in the presence of him, the said John W. Whitbeck.

My comm. expires 3/30/23.

F. A. MASSEY,
Notary Public, New York County.

#119. N. Y. Reg. #3209.

At a regular meeting of the Board of Directors of the Fidelity and Deposit Company of Maryland, held in its office in the City of Baltimore, State of Maryland, on the 9th day of February, 1921, the following resolution was unanimously adopted:

"Resolved, That Franklin D. Roosevelt, James R. Kingsley, Hugh M. Allwood, Ernest L. Hicks, James P. Farrell, Frank A. Eickhoff, Vincent Cullen, John A. Griffin, Frances A. Massey, John W. Whitbeck, Thomas E. White, Raymond C. Laib, A. T. W. MacCormick and Harry B. Sprague, all of the City of New York, State of New York, be and each of them is hereby appointed Attorney-in-Fact of this Company and empowered to execute and deliver and attach the seal of the Company to any and all bonds or undertakings for or on behalf of this Company.

"Such bonds or undertakings to be executed for the Company by any one of the said Franklin D. Roosevelt, James R. Kingsley, Hugh M. Allwood, Ernest L. Hicks, James P. Farrell, Frank A. Eickhoff, Vincent Cullen, John A. Griffin, Frances A. Massey, John W. Whitbeck, Thomas E. White, Raymond C. Laib, A. T. W. MacCormick, or Harry B. Sprague, and to be attested in every instance by one other of the said Attorneys-in-Fact, as occasion may require.

"This power of attorney revokes that of January 18th, 1921, in behalf of Franklin D. Roosevelt, et al."

I, Ernest L. Hicks, Attorney-in-Fact of the Fidelity and Deposit Company of Maryland, have compared the foregoing Resolution with the original thereof, as recorded in the Minute Book of said Company and do hereby certify that the same is a true and correct transcript therefrom, and of the whole of the said original Resolution. Given under my hand and the seal of the Company, at the City of New York, this 1st day of February, 1922.

[SEAL.] ERNEST L. HICKS,
Attorney-in-Fact.

29 Fidelity and Deposit Company of Maryland.

Statement, December 31, 1920.

Assets.

Home Office Building and Annex	$2,400,000.00
Other Real Estate	37,538.56
Bonds and Stocks, (Insurance Department valuations)	6,856,993.59
First Mortgage Loans, etc.,	239,733.41
Unpaid Premiums, (subsequent to Oct. 1, 1920)	1,091,442.41
Unpaid Premiums, (prior to Oct. 1, 1920)	376,505.15
Bank Deposits for use of Branch Offices, etc.,	53.191.61
Cash in Banks and Trust Companies	1,778,804.84
Total Assets	12,834,209.57
Unpaid Premiums, (prior to Oct. 1, 1920) (Deducted according to rulings and regulations of various Insurance Departments.)	376,505.15
Total Assets (on basis of statement to Insurance Departments)	12,457,704.42

Liabilities.

Reserve for Unearned Premiums		$3,446,816.34
Reserve for Claims		2,161,194.38
Reserve for Advance Premiums and Return Premiums		192,093.09
Reserve for Commissions (Unpaid Premiums subsequent to Oct. 1, 1920)		143,604.51
Reserve for Taxes, and Expenses in Transit		431,059.87
Reserves, Special and Contingent		628,288.91
Reserve for Unpaid Reinsurance Premiums		330,583.07
Total Reserves		7,333,640.17
Capital Stock, paid up	$3,000,000.00	
Surplus and Undivided Profits	$2,500,569.40	
Less Unpaid Premiums, (prior to Oct. 1, 1920.) Deducted according to Insurance Department Regulations. (See above)	376,505.15	
Surplus and Undivided Profits (on basis of statement to Insurance Departments,)	2,124,064.25	
Surplus to Policy Holders		5,124,064 25
		12,457,704.42

STATE OF NEW YORK,
County of New York, ss:

Ernest L. Hicks being duly sworn, says that he is the Attorney-in-Fact of the Fidelity and Deposit Company of Maryland, that the foregoing is a true and correct statement of the financial condition of the said Company, as of December 31, 1920, to the best of his knowledge and belief, and that the financial condition of said Company is as favorable now as it was when such statement was made.

ERNEST L. HICKS.

Subscribed and sworn to before me this 1st day of February 1922.

[SEAL.]

F. A. MASSEY,
Notary Public, New York County, #119.

(Endorsed:) F 61 Eq. Supreme Court of the United States. W. L. Porterfield and Y. Mizuno, Appellants, against U. S. Webb, as Attorney General of the State of California, and Thomas Lee Woolwine, as District Attorney of the County of Los Angeles, State of California, Appellees. Original. Bond on Appeal. Filed Feb. 17, 1922. Chas. N. Williams, Clerk, by R. S. Zimmerman, Deputy Clerk. Louis Marshall, Attorney for Appellants, 120 Broadway, New York City. Fidelity and Deposit Company of Maryland 120 Broadway New York.

31 Supreme Court of the United States.

W. L. PORTERFIELD and Y. MIZUNO, Appellants,

against

U. S. WEBB, as Attorney General of the State of California, and Thomas Lee Woolwine, as District Attorney of the County of Los Angeles, State of California, Appellees.

Præcipe.

To the Clerk of the United States District Court, Southern District of California, Southern Division, at Los Angeles:

Please issue a certified copy of the records in the above entitled proceeding, consisting of the following papers:

1. Plaintiffs' bill of complaint.
2. Plaintiffs' motion for temporary injunction.
3. Order of Hon. Oscar A. Trippet that the application for temporary injunction be heard.
4. Opinion of the Court on denial of motion for temporary injunction.
5. Order entered on such denial.
6. Petition for Appeal.
7. Allowance of Appeal.
8. Assignments of Error.
9. Bond on Appeal.
10. Citation on Appeal.
11. Præcipe for Transcript of Record.

Said record to be certified under the hand of the Clerk and the seal of the Court.

Dated, February 9, 1922.

LOUIS MARSHALL,
Attorney for Plaintiffs and Appellants.

32 Receipt of a copy of the foregoing Præcipe is hereby admitted this 18 day of February, 1922, and it is hereby stipulated and agreed that the papers mentioned and described therein are all the papers necessary to a determination by the Supreme Court of the United States of the appeal prosecuted by said appellants, and that such record shall constitute the transcript of record on appeal from the order appealed from, and that said appeal may be heard and determined upon such transcript of record.

U. S. WEBB,
Attorney General State of California,
FRANK ENGLISH,
Deputy Attorney General,
Attorneys for Defendant U. S. Webb.
THOS. LEE WOOLWINE AND
TRACY C. BECKER,
Attorneys for Defendant Thomas Lee Woolwine, District Attorney, etc

(Endorsed:) F 61 Equity. United States Supreme Court. W. L. Porterfield and Y. Mizuno, Appellants, against U. S. Webb, as Attorney General of the State of California, and Thomas Lee Woolwine, as District Attorney of the County of Los Angeles, State of California, Appellees. Præcipe. Louis Marshall, Attorney for Appellants, 120 Broadway, New York City. Filed Feb. 21, 1922. Charles N. Williams Clerk by Edmund L. Smith Deputy Clerk.

33 In the District Court of the United States in and for the Southern District of California, Southern Division.

No. F-61. Equity.

W. L. PORTERFIELD and Y. MIZUNO, Appellants,

vs.

U. S. WEBB, as Attorney General of the State of California, and Thomas Lee Woolwine, as District Attorney of the County of Los Angeles, State of California, Appellee-.

I, Chas. N. Williams, Clerk of the District Court of the United States of America, in and for the Southern District of California, Southern Division, do hereby certify the foreg-ing thirty-two typewritten pages, numbered from one to thirty-two inclusive, and comprising one volume, to be a full, true, and correct copy of the Bill of Complaint, Motion for Temporary Injunction, Order that Motion for Temporary Injunction be Heard, Order Denying Allowance of Temporary Injunction, Opinion of Judge Dooling, Petition for Appeal, Order Allowing Appeal, Assignments of Error, Bond on Appeal, Præcipe for Transcript on Appeal, filed in my office on behalf of the Appellant by his Solicitor of Record.

I do further certify that the cost of the foregoing record is $10.25, the amount whereof has been paid me by the Appellant in said action.

34 In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court of the United States of America, in and for the Southern District of California, Southern Division, this second day of March, in the year of our Lord, One Thousand Nine Hundred and Twenty-two, and of our Independence the One Hundred and Forty-sixth.

[Seal of the U. S. District Court, Southern Dist. of California.]

CHAS. N. WILLIAMS,
Clerk,
By R. S. ZIMMERMAN,
Deputy Clerk.

35 [Endorsed:] No. F 61 Eq. United States District Court, Southern District of California, Southern Division. W. L. Porterfield and Y. Mizuno, Appellants, vs. U. S. Webb, as Attorney General et al. Certified Transcript on Appeal to the Supreme Court of the United States.

Endorsed on cover: File No. 28,758. S. California D. C. U. S. Term No. 803. W. L. Porterfield, and Y. Mizuno, appellants, vs. U. S. Webb, as attorney general of the State of California, and Thomas Lee Woolwine, as district attorney of the county of Los Angeles. Filed March 10th, 1922. File No. 28,758.

APR 5 1922
WM. R. STANSBURY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1921.

No. [redacted]28

W. L. PORTERFIELD and Y. MIZUNO,

Appellants,

against

U. S. WEBB, as Attorney General of the State of California, and THOMAS LEE WOOLWINE, as District Attorney of the County of Los Angeles, State of California,

Appellees.

MOTION TO ADVANCE.

LOUIS MARSHALL,
Attorney for Appellants,
120 Broadway,
New York City.

PRESS OF FREMONT PAYNE, Inc., 80 Washington St., New York City.

Supreme Court of the United States

OCTOBER TERM, 1921.

No. 803.

W. L. PORTERFIELD and Y. MIZUNO,
Appellants.

against

U. S. WEBB, as Attorney General of the State of California, and THOMAS LEE WOOLWINE, as District Attorney of the County of Los Angeles, State of California,
Appellees.

Sirs:

PLEASE TAKE NOTICE that on the Record herein and on the annexed Statement a motion will be made at a session of the Supreme Court of the United States to be held at the Capitol in the City of Washington, D. C., at noon on April 10, 1922, or as soon thereafter as counsel can be heard, for

an order advancing the argument of the above entitled cause for such early date as by the Court shall be deemed proper.

Dated, New York, March 15, 1922.

Yours, etc.,

LOUIS MARSHALL,
Attorney for Appellants,
120 Broadway,
New York City.

To

U. S. WEBB, Esq.,
Attorney General of the State of California.

THOMAS LEE WOOLWINE, Esq.,
District Attorney of the
County of Los Angeles,
State of California.

Statement.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1921.

No. 803.

W. L. PORTERFIELD and Y. MIZUNO,
Appellants,

against

U. S. WEBB, as Attorney General of the State of California, and THOMAS LEE WOOLWINE, as District Attorney of the County of Los Angeles, State of California,
Appellees.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

The appellants W. L. Porterfield and Y. Mizuno respectfully ask this Court to advance the argument of this cause on the following grounds:

This action was brought as a test case to procure an adjudication as to the constitutionality of the so-called California Anti-Alien Land Law, adopted by initiative on November 2, 1920. The

appellant Porterfield is a citizen of the United States and of the State of California, who owns a parcel of land devoted to agriculture which he is desirous of leasing to the appellant Mizuno, who is an alien of the Japanese race and not a free white person or of African nativity or of African descent and who is desirous of leasing these premises for farming purposes for a term of years. Under the terms of the statute aliens not eligible to citizenship under the laws of the United States are prohibited from acquiring, possessing, enjoying and transferring real property or any interest therein in the State of California, while all other aliens are permitted to do so.

All real property acquired in fee and any leasehold or other interest in real property less than the fee acquired in violation of the provisions of the act by an alien thereby prohibited from acquiring such ownership or interest, is to escheat to the State of California. Every transfer of real property or of an interest therein, is declared to be void as to the State and the interest thereby conveyed or sought to be conveyed is to escheat to the State if the property interest therein involved is of such a character that an alien of the excluded class acquires it. If two or more persons conspire to effect a transfer of real property or of an interest therein in violation of the provisions of the act they are punishable by imprisonment not exceeding two years or by a fine not exceeding $5,000, or both.

The appellants contend that the effect of this legislation is to deprive citizens of the United States owning agricultural lands of their liberty and property and of the equal protection of the laws, in violation of Section 1 of the Fourteenth

Amendment to the Constitution of the United States. They also contend that it deprives aliens of the Japanese race resident in California of the right to lease agricultural lands in that State, while all other aliens are permitted to do so, thereby depriving them of the equal protection of the laws and subjecting them to a discrimination on the ground of color, race and nationality, in violation of the same provision of the Constitution.

The question is also presented by the record in this cause as to whether or not this statute deprives the appellant Mizuno, who is a subject of the Empire of Japan, of rights, privileges and immunities secured to him under the treaty between the United States and Japan.

Prior to the passage of the act persons of the Japanese race were engaged in farming in the State of California and owned and leased lands for that purpose. There are approximately 63,761 Japanese in the State, of whom the rural population amounts to 37,530. 1,093 are land-owners. 6,402 are tenant farmers. The total acreage of farms cultivated by them was approximately 300,470 acres. The average acreage cultivated per farm was 40 acres. The value of their farm products was approximately $33,000,000 annually.

Hence, not only are all Japanese residents of California who have heretofore been engaged in agriculture directly concerned in the determination of the appeal herein, but all other Japanese who may desire to earn a livelihood by becoming the owners or tenants of agricultural property, as well as all citizens of the United States owning agricultural lands in California who may find it ad-

vantageous to sell or lease such lands to Japanese residents, are equally affected.

An early adjudication by this Court of the important questions involved herein is therefore believed to be in the public interest.

Respectfully submitted,

LOUIS MARSHALL,
Appellants' Counsel.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1921.

No. 803.

W. L. PORTERFIELD and Y. MIZUNO,
Appellants,

against

U. S. WEBB, as Attorney General of the State of California, and THOMAS LEE WOOLWINE, as District Attorney of the County of Los Angeles, State of California,
Appellees.

Due, timely and proper service of the annexed Statement and Notice of Motion is hereby admitted.

Dated, March 30, 1922.

U. S. WEBB,
Attorney General of the
State of California
by Frank C. [illegible]
Dep.

THOMAS LEE WOOLWINE,
District Attorney of the County of Los Angeles,
State of California.
by Tracy C. Becker
Dep. Dist. Atty

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POINT II. The Act is Likewise Unconstitutional Because it Deprives Porterfield, who is a Citizen of the United States, of the right to enter into contracts for the leasing of his realty, and because it deprives Mizuno of his liberty and property by debarring him from entering into a contract for the purpose of earning a livelihood in a lawful occupation 69, 70

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the enforcement of the Alien Land Law submitted by the initiative and approved by the electors of California November 2, 1920, from causing the appellants to be arrested for violating the terms and provisions of the act, and from taking any action interfering with the appellants in executing and delivering a lease described in the bill of complaint, the appellants contending that the act is unconstitutional, in that it denies to them the equal protection of the laws and deprives them of their property without due process of law and is in conflict with Section 1977 of the Revised Statutes of the United States and repugnant to the treaty between the United States of America and the Empire of Japan (*Rec.*, pp. 5-9).

The Bill of Complaint.

The appellant Porterfield is a citizen of the United States and of the State of California; the appellant Mizuno, a Japanese and a subject of the Emperor of Japan, and a resident of California. The defendant Webb is the Attorney General of the State of California, and the defendant Woolwine is the District Attorney of the County of Los Angeles in that State.

Porterfield is and for some years past has been the owner of a farm in Los Angeles County containing eighty acres of land, which is particularly adapted to raising vegetables. For some years past it has been and is now devoted to that and agricultural purposes. Mizuno is a capable farmer and is in all respects a desirable person to become a tenant of this real estate. Porterfield desires to lease the land to Mizuno for a term of five years, and Mizuno desires to accept the lease, and, but for the acts of the defendants, the ap-

pellants would execute it (*Rec.*, pp. 2, 3). Mizuno, in addition to being a farmer, is engaged in the business of trading at wholesale and retail in farm products, and instead of purchasing them desires to raise his own products for the purpose of selling them in the wholsesale and retail trade, and he desires to lease the farm as an incident to his business (*Rec.*, p. 3).

Assuming to act under the Alien Land Law, the defendants have threatened to enforce its provisions against the appellants in the event that they should enter into the proposed lease of the Porterfield farm, and will attempt to forfeit the leasehold interest to the State of California and prosecute the appellants criminally for an alleged violation of the act.

The statute is in its terms so drastic and the penalties attached to a violation of it so great that the appellants may not even execute this lease for the purpose of testing the constitutionality and validity of the act, so that unless the Court shall pass upon the validity of the statute in this action the appellants will be compelled to submit to it whether it be valid or otherwise, and thereby be deprived of their liberty and property without due process of law and denied the equal protection of the laws, in contravention with the Fourteenth Amendment to the Federal Constitution (*Rec.*, p. 4).

The California Alien Land Law.

The full text of this statute is to be found in Appendix A of this brief. The controlling provisions applicable to this case will be briefly quoted.

> "Section 1. All aliens eligible to citizenship under the laws of the United States may

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Supreme Court of the United States.

OCTOBER TERM, 1922.

No. 299.

W. I. PORTERFIELD and Y. MIZUNO,
Appellants,

against

U. S. WEBB, as Attorney General of the State of California, and THOMAS LEE WOOLWINE, as District Attorney of the County of Los Angeles.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

APPELLANTS' POINTS.

This is an appeal from an order denying an interlocutory injunction, the application for such order having been heard by Honorable William H. Hunt, Circuit Judge, and Honorable Benjamin F. Bledsoe and Honorable Maurice T. Dooling, District Judges, pursuant to statute, the purpose being to restrain the defendants from directly or indirectly permitting any proceeding in law or in equity to be brought against the appellants for

the enforcement of the Alien Land Law submitted by the initiative and approved by the electors of California November 2, 1920, from causing the appellants to be arrested for violating the terms and provisions of the act, and from taking any action interfering with the appellants in executing and delivering a lease described in the bill of complaint, the appellants contending that the act is unconstitutional, in that it denies to them the equal protection of the laws and deprives them of their property without due process of law and is in conflict with Section 1977 of the Revised Statutes of the United States and repugnant to the treaty between the United States of America and the Empire of Japan (*Rec.*, pp. 5-9).

The Bill of Complaint.

The appellant Porterfield is a citizen of the United States and of the State of California; the appellant Mizuno, a Japanese and a subject of the Emperor of Japan, and a resident of California. The defendant Webb is the Attorney General of the State of California, and the defendant Woolwine is the District Attorney of the County of Los Angeles in that State.

Porterfield is and for some years past has been the owner of a farm in Los Angeles County containing eighty acres of land, which is particularly adapted to raising vegetables. For some years past it has been and is now devoted to that and agricultural purposes. Mizuno is a capable farmer and is in all respects a desirable person to become a tenant of this real estate. Porterfield desires to lease the land to Mizuno for a term of five years, and Mizuno desires to accept the lease, and, but for the acts of the defendants, the ap-

pellants would execute it (*Rec.*, pp. 2, 3). Mizuno, in addition to being a farmer, is engaged in the business of trading at wholesale and retail in farm products, and instead of purchasing them desires to raise his own products for the purpose of selling them in the wholsesale and retail trade, and he desires to lease the farm as an incident to his business (*Rec.*, p. 3).

Assuming to act under the Alien Land Law, the defendants have threatened to enforce its provisions against the appellants in the event that they should enter into the proposed lease of the Porterfield farm, and will attempt to forfeit the leasehold interest to the State of California and prosecute the appellants criminally for an alleged violation of the act.

The statute is in its terms so drastic and the penalties attached to a violation of it so great that the appellants may not even execute this lease for the purpose of testing the constitutionality and validity of the act, so that unless the Court shall pass upon the validity of the statute in this action the appellants will be compelled to submit to it whether it be valid or otherwise, and thereby be deprived of their liberty and property without due process of law and denied the equal protection of the laws, in contravention with the Fourteenth Amendment to the Federal Constitution (*Rec.*, p. 4).

The California Alien Land Law.

The full text of this statute is to be found in Appendix A of this brief. The controlling provisions applicable to this case will be briefly quoted.

> "Section 1. All aliens eligible to citizenship under the laws of the United States may

acquire, possess, enjoy, transmit and inherit real property, or any interest therein, in this state, in the same manner and to the same extent as citizens of the United States, except as otherwise provided by the laws of this state."

"Section 2. All aliens other than those mentioned in section 1 of this act may acquire, possess, enjoy and transfer real property, or any interest therein, in this state, in the manner and to the extent and for the purpose prescribed by any treaty now existing between the government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise."

Section 7 provides for the escheat of any real property acquired in fee in violation of the provisions of the act by any alien mentioned in Section 2.

Section 8 provides that "any leasehold or other interest in real property less than the fee, hereafter acquired in violation of the provisions of this act by any alien mentioned in section two of this act, or by any company, association or corporation mentioned in section three of this act, shall escheat to the State of California. The attorney general or district attorney of the proper county shall institute proceedings to have such escheat adjudged and enforced as provided in section seven of this act."

Further provisions are made as to the procedure to be followed.

Section 10 reads:

"If two or more persons conspire to effect a transfer of real property, or of an interest therein, in violation of the provisions hereof, they are punishable by imprisonment in the county jail or state penitentiary not

exceeding two years, or by a fine not exceeding five thousand dollars, or both."

In order to give significance to the language of Section 2 of this statute, in so far as it refers to any treaty between the United States and the nation or country of which an alien is a citizen or subject, it is desirable to have before the Court the language of Articles I and II of the Treaty of Commerce and Navigation with Japan, dated February 21, 1911:

"ARTICLE I."

The citizens or subjects of each of the High Contracting Parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established.

They shall not be compelled, under any pretext whatever, to pay any charges or taxes other or higher than those that are or may be paid by native citizens or subjects.

The citizens or subjects of each of the High Contracting Parties shall receive, in the territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or may be granted to native citizens or subjects, on their submitting themselves to the conditions imposed upon the native citizens or subjects.

They shall, however, be exempt in the territories of the other from compulsory military service either on land or sea, in the regular forces, or in the national guard, or in the

militia; from all contributions imposed in lieu of personal service, and from all forced loans or military exactions or contributions."

"ARTICLE II.

The dwellings, warehouses, manufactories and shops of the citizens or subjects of each of the High Contracting Parties in the territories of the other, and all premises appertaining thereto used for purposes of residence or commerce, shall be respected. It shall not be allowable to proceed to make a domiciliary visit to, or a search of, any such buildings and premises, or to examine or inspect books, papers or accounts, except under the conditions and with the forms prescribed by the laws, ordinances and regulations for nationals."

When the Alien Land Law was submitted to the electorate of California at the general election on November 2, 1920, in accordance with the provisions of law regulating such an election, arguments for and against the proposed law were presented in pamphlet form to the voters. From these arguments it appears that this legislation was aimed especially at the Japanese.

Statistics of 1920 Relating to the Population of and Land Ownership in the Pacific Coast States.

The total population of California was 3,426,861. The Japanese population was 70,196.

The total population of the State of Washington was 1,356,621. The Japanese population was 17,114.

The total population of the State of Oregon was 783,389. The Japanese population was 4,022.

	Acres
The total land area of California is	99,617,280
The farm land area of California is	27,931,144
California land owned by Japanese individuals	26,928
Land owned by American corporations with Japanese shareholders	47,781
Land cultivated by Japanese under leases	192,150
Land cultivated by Japanese under crop-sharing contracts	121,000
Land cultivated by Japanese under labor contracts	70,137
The total land area of the State of Washington is	42,745,040
The farm land area of Washington, exclusive of Federal domain, is	6,573,540
Land operated by Japanese under lease	20,500
The total land area of Oregon is	61,188,280
Farm land operated by Japanese	10,096

The land thus owned in California by Japanese individuals and American corporations with Japanese shareholders aggregates 74,769 acres, or one-fourth of one per cent. of the farm land area of the State. The land cultivated by Japanese under leases amounts to about two-thirds of one per cent. of the farm land area of the State, and that operated under crop and labor contracts approximately two-thirds of one per cent. of the farm land area of the State.

The total farm land in Washington operated by Japanese under lease is approximately one-eighth of one per cent. of the farm land area of the State; and the farm land operated by the Japanese in Oregon is less than one-fiftieth of one per cent. of the farm land area of the State.

These figures would seem to dissipate the idea that the pursuit of agriculture by the Japanese in the Pacific Coast States is a menace. This is further demonstrated by the fact that California's food products are valued at $507,000,000 in a single year, of which the Japanese produced $67,-145,000, of which thirty-five per cent. goes to the land owners, forty-five per cent. to labor, in the form of wages, leaving only twenty per cent. to Japanese owners, tenants or croppers.

It is also important to note that, of the farm lands of California, 16,511,550 acres are unimproved, and only 11,389,894 acres are improved.

To a considerable extent the lands cultivated by the Japanese were unimproved lands or lands the cultivation of which was abandoned by their former occupants.

The acreage cultivated by Japanese in California is principally devoted to the production of berries, celery, asparagus, seeds, onions, tomatoes, canteloupes, sugarbeets, green vegetables, potatoes, rice, grapes, beans, cotton, corn, fruit and nuts.

These facts, derived from official sources, are contained in "*The Real Japanese Question,*" by Mr. K. K. Kawakami, 1921 (The Macmillan Company), and in "*Japanese in America,*" by Mr. E. Manchester Boddy, published at Los Angeles in 1921.

The Chinese population of California amounted to approximately 36,000, who are but little concerned in the land question.

Questions to be Discussed.

First. Without intending to waive the appellants' rights in a proper case to litigate any questions arising under the treaty between the United States and Japan, we shall confine our argument in this case to those arising under the Fourteenth Amendment to the Constitution of the United States.

Second. It will be assumed, but not admitted, in the course of this argument, that the Japanese are not eligible to citizenship under the laws of the United States. In view of the fact that the question of their eligibility is now under advisement by this Court in *Ozawa* v. *United States* and *Yamashita* v. *Hinkle,* it would be inadvisable to reargue that proposition. Should it be held that they are eligible, then, under Section 1 of the California Alien Land Law, Japanese, as well as Greeks, Bulgarians, Czechoslovakians, Germans, Hungarians, Poles, French, Spaniards, British and African Negroes, being eligible to citizenship, would have the unquestioned right to "acquire, possess, enjoy, transmit and inherit real property or any interest therein" in the State of California, "in the same manner and to the same extent as citizens of the United States."

Third. It is well to premise, that we do not question the right of any State, by its Constitution or statutes, to forbid an alien to acquire the ownership of real property within its jurisdiction. We

contend, however, that, under the Fourteenth Amendment, it cannot permit some aliens to acquire such property and prohibit others from doing so on account of their race, color or nationality; for, as we shall show, that would violate the equal protection clause of the Constitution.

Assignments of Error.

Stated in abbreviated form, they are as follows:

(1) That the court below erred in adjudging the California Alien Land Law a constitutional act.

(2) That it erred in adjudging that that act did not deprive the appellant Porterfield of his liberty or property without due process of law, or deny him the equal protection of the laws.

(3) That it erred in adjudging that the act did not deny the appellant Mizuno of the equal protection of the laws in violation of Section 1 of the Fourteenth Amendment.

(4) That it erred in adjudging that it did not deprive the appellant Mizuno of the liberty of pursuit of a lawful occupation, to wit, that of agriculture under a lease of land located in California, in violation of Section 1 of the Fourteenth Amendment.

(5) That it erred in adjudging that the Fourteenth Amendment did not give to the appellant Porterfield, who is a citizen of the United States, the right to lease land belonging to him in the State of California to the appellant Mizuno, who is an alien of the Japanese race.

(6) That it erred in adjudging that the Fourteenth Amendment did not give the appellant Mi-

zuno, who is an alien of the Japanese race, the right to acquire, possess and enjoy an interest in real property in the State of California under a lease thereof for a term of years.

(7) That it erred in refusing to decide that the California Alien Land Law is unconstitutional and in violation of Section 1 of the Fourteenth Amendment, in that it discriminates against the appellant Mizuno on the ground of color, race and nationality.

(8) That it erred in refusing to decide that the California Alien Land Law deprived the appellant Porterfield of his liberty and property without due process of law, and that it denied to him the equal protection of the laws.

(9) That it erred in refusing to decide that the California Alien Land Law denied the appellant Mizuno of the equal protection of the laws and deprived him of the liberty to pursue a lawful occupation to-wit, that of agriculture under a lease of land located in California (*Rec.*, pp. 14-16).

POINTS.

I.

The California Alien Land Law forbids aliens ineligible to citizenship under the laws of the United States to lease real property in the State, although the right to do so has been conferred on all other aliens. The former are thus deprived of the equal protection of the laws within the meaning of the Fourteenth Amendment.

The Discriminatory Features of the Law.

Section 671 of the *Civil Code of California* provides:

"Any person, whether citizen or alien, may take, hold and dispose of property, real or personal, within this state."

Section 672 reads:

"If a non-resident alien takes by succession, he must appear and claim the property within five years from the time of succession or be debarred. The property in such case is disposed of as provided in title eight, part three, code of civil procedure."

By the *General Laws of 1913 of California,* page 206, Act No. 113, a statute in many respects similar to the law now under consideration, but by no means so drastic, was adopted. It permitted even aliens who were ineligible to citizenship to lease lands in the State for agricultural purposes for a term of three years.

The initiative act of 1920 eliminated the provision as to leasing, and added to the Act of 1913 the last sentence now appearing in Section 3 of the amended act, also the whole of Sections 4 and 5, the last sentences of the present Sections 7 and 8, all of Sections 9 and 10, subdivisions a, b and c of Section 12, and all of Sections 13 and 14.

The phrase to be found in Sections 1 and 2 of the act of 1913, as well as in the present Alien Land Law, "all aliens eligible to citizenship under the laws of the United States," which apparently is expressive of the basic thought running throughout the statute, undoubtedly refers to *Section 2169 of the United States Revised Statutes.* This is supposed to constitute a part of the Naturalization Law, and reads:

"The provisions of this Title shall apply to aliens being free white persons, and to aliens

of African nativity and to persons of African descent."

The persons eligible to citizenship are, therefore, all aliens who come within the description of free white persons and all aliens of African nativity and of African descent. That would include, broadly speaking, the natives of every European country, without exception, all of the white and black people of North, Central and South America; Armenians born in Asiatic Turkey; Mexicans, Parsees; Syrians born in Damascus or at Beirut; all native-born Africans from the Mediterranean to the Cape of Good Hope. It excludes Chinese, Japanese and Malayans.

Under the California Alien Land Law it is not necessary that the aliens who may acquire real property shall reside in California. So long as they come within the test of Section 2169 of the United States Revised Statutes as to color or nativity, they are eligible to citizenship, and, therefore, entitled to acquire real property in California.

This right of acquisition thus affirmatively conferred upon the aliens described in Section 1 of the act, and which inures to their benefit whether resident within the State or not, includes any interest in real property, whether it be a leasehold or a title in fee simple absolute. It is not limited as to the character of the property—it may be adapted to residential, commercial, mining or agricultural purposes. Nor does the State limit the quantity of real property that any alien described in the first section may acquire—it may be all of the land of the State, or any part of it.

Thus non-resident Germans, Russians, Poles, Italians, Scandinavians, or British, might at any

time since 1913 have become the owners of unlimited acreage in the State and may still do so, without let or hindrance.

We say this advisedly, because Section 1, Article XVII, of the *California Constitution* does not stand in the way. It is not prohibitive in its terms. So far as it goes, it is merely permissive. It excludes nobody. It reads:

> "Foreigners of the white race or of African descent eligible to become citizens of the United States under the naturalization laws thereof, while bona fide residents of this state, shall have the same rights in respect to the acquisition, possession, enjoyment, transmission and inheritance of all property, other than real estate, as native born citizens; provided, that such aliens owning real estate at the time of the adoption of this amendment *may remain such owners;* provided further, that the legislature *may*, by statute, provide for the disposition of real estate which shall *hereafter* be acquired by such aliens by descent or devise."

The Legislature is not, however, prohibited by this provision from conferring the right to hold real property upon any "foreigners" or "aliens".

The District Court of Appeals of California in *Re Turner's Estate,* 196 Pacific Rep. 807, has distinctly so held on the authority of *Blythe* vs. *Hinckley,* 127 Cal. 431. An application for a writ of certiorari to review this decision was denied by this Court on January 11, 1922, under title *Herrick* vs. *Basletta,* 237 U. S. 658.

The provision of the California Constitution just quoted, contains no words of prohibition. Nor was the grant of permission to foreigners of the white race or of African descent to acquire personal property necessary. Under the due process

clause of the Fourteenth Amendment that right existed and could not be taken away from any foreigner or alien though not of the white race or of African descent. The reference in this constitutional provision to real property did not constitute a prohibition to the foreigners mentioned, or any other foreigner, to acquire it. The distinguished framers of the Civil Code did not so interpret the Constitution; nor did the draftsmen of the Alien Land Law of 1913 or of 1920 so interpret the Constitution. They properly regarded the entire subject as left by the Constitution within the unhampered jurisdiction of the Legislature. The legislative power of the State is vested in the Senate and Assembly (Art. IV, §1), and in the exercise of that power the provisions of the Civil Code and of the Alien Land Law of 1913 and of 1920 were enacted.

We repeat, therefore, that, under the legislation of California, aliens described in Section 1 of the Act of 1920 may acquire the whole or any part of the lands of California, even though they may never have set foot on the soil of that State.

At all events, even were this statement disputed, there can be no doubt that were the aliens described in Section 1 actually domiciled in California they could undoubtedly acquire the title to and hold all of the agricultural lands in the State, even were the nations to which they may be subject actually at war with the United States. The Japanese, however, who are the subjects of a friendly and honorable nation, with which we were associated during the late war, some of whom fought side by side with our citizens, because of their color or racial stock, and regardless of their economic value, their intellectual qualities and their moral virtues, are sought to be debarred of

the right which is freely bestowed on other aliens, who may have been arrayed against us in arms and who in every way may be inferior to the Japanese.

Without in any way seeking to belittle the men of other races or nationalities, it is difficult to understand the basis of discrimination under this statute between the illiterate Portuguese, the inhabitants of Paraguay, Mexico or Venezuela, the Russian mujik, Slovenes and Hungarians, Montenegrins and Croatians, Sicilians and Syrians, and the industrious, enterprising and intelligent Japanese, who while cultivating land occupied by them in California have converted burning deserts into smiling oases and regions infested with malaria into marvels of fertility.

Distinction Between Powers of Congress and State Legislatures.

(*a*) We are not now considering the subject of immigration. That does not come within the legislative power of the State. It is a subject with which the Federal Government alone can deal. It undoubtedly has the power to restrict, or even to prohibit, immigration. The State, however, cannot interfere with it, either directly or indirectly, whether it be by the adoption of prohibitive or regulatory measures.

Chy Lung v. *Freeman*, 92 U. S. 275.
People v. *Compagnie Generale Transatlantique*, 107 U. S. 59.
Fong Yue Ting v. *United States*, 149 U. S. 698, 713.

(*b*) Nor are we here concerned with the subject of naturalization. Here, too, Congress is supreme. (*Const. U. S.*, Art. I, § 8, cl. 4.) Its action is subject to no limitation in that regard. The right of naturalization may be granted or withheld. It may be conferred generally or to certain categories only. Congress has seen fit, by Section 2169 of the United States Revised Statutes, to define those who are entitled to naturalization. That limitation, however, extends no further than to the subject to which it is in express terms confined.

(*c*) In like manner, Congress is given sole authority "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." (*Const. U. S.*, Art. IV, § 3, cl. 2.) Under this authority it may legislate as it chooses with regard to the disposition of the public domain, and as to those who may acquire lands or an interest in real property belonging to the United States. Whatever limitation upon the right to acquire such property Congress may decide to adopt is controlling. There is no constitutional limitation restrictive of its power.

The State, however, can only legislate subject to the conditions prescribed by the Federal Constitution, and especially those contained in the Fourteenth Amendment.

(*d*) We may, therefore, freely concede that in conformity with the common law it was within the power of California to confine the ownership of land or of an interest therein to citizens. It has expressly refrained from exerting that power. Far from asserting it, it has in its Civil Code affirmatively recognized the right of all aliens to acquire real property and by the Acts of 1913 and 1920 has recognized the right of one class of aliens

without restriction of any kind to own any interest whatsoever in California lands and has at the same time forbidden another class to acquire any interest at all in realty except as permitted by treaty. This, we earnestly contend, denies to the latter that equal protection of the laws guaranteed by the Fourteenth Amendment "to any person within the jurisdiction of the State."

(*e*) What Section 1 of the act of 1920 confers upon some aliens, is by Section 2 denied to others, solely because in one case the aliens are white or black and in the other they are red, yellow or brown. It is not made dependent upon character, morals, economic position, intellectual or physical capacity, ability to increase the wealth of the State or the value of its taxable property, or a willingness to serve the State. It is merely the result of arbitrary selection, and as between aliens coming from fifty different lands those from forty are given the unqualified and unconditional right to acquire real property or an interest in it, while those coming from ten other countries are absolutely prohibited, under the penalty of escheat, imprisonment and fine, from taking even a lease for a single year of realty devoted to uses other than for residential or commercial purposes. Can this be said to constitute the equal protection of the laws?

Yick Wo vs. Hopkins and Truax vs. Raich, and their application.

The noble utterance of Mr. Justice Matthews in *Yick Wo* v. *Hopkins,* 118 U. S. 368, reiterated by Mr. Justice Hughes in *Truax* v. *Raich,* 239 U. S. 39, rings in one's ears:

"The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: 'Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, or color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws. It is accordingly enacted by § 1977 of the Revised Statutes, that 'all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.' The questions we have to consider and decide in these cases, therefore, are to be treated as involving the rights of every citizen of the United States equally with those of the strangers and aliens who now invoke the jurisdiction of the court. * * *

"When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation

of power. It is, indeed, quite true, that there must always be lodged somewhere, and in some person or body, the authority of final decision; and in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage. But the fundamental rights of life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth 'may be a government of laws and not of men.' For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

In that case a municipal ordinance of San Francisco to regulate the carrying on of public laundries within the limits of the municipality, was held to be violative of the guaranties of protection contained in the Fourteenth Amendment, because it conferred upon the municipal authorities arbitrary power, at their own will, and without regard to discretion in the legal sense of the term, to give or withhold consent as to persons or places without regard to the competency of the persons applying or the propriety of the place selected, for the carrying on of the business. There the petitioners, who were Chinese, had been arrested upon the charge of conducting laundries within a speci-

fied district without the special consent of the Board of Supervisors first obtained. They showed that others who were not Chinese and who were conducting upwards of eighty laundries under similar conditions, were left unmolested and free to enjoy the enhanced trade and profits arising from this discrimination.

It was these facts to which these memorable words were applied, and which led to this further remark:

> "In the present cases we are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration. For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

In the case at bar the equal protection of the law was not denied by those who administered an ordinance fair upon its face, but the inequality, the oppressiveness, the discrimination sought to be practiced, is written all over the statute. It absolutely denied to the Japanese alien what is freely conferred on the German, Austrian, Bulgarian and Turk; just as it would have done had the act, in so many words, conferred the right to acquire property on Germans, Austrians, Bulgarians and Turks, and denied it, in so many words, to the Japanese. If *Yick Wo* v. *Hopkins* had presented a classification similar to that made in the present case, of prohibiting Japanese or Chinese from conducting laundries and permitting other aliens who were free white persons or of African nativity or descent to carry on the business, can there be any doubt but that the same result would have been reached?

In *Truax* v. *Raich, supra,* a statute of Arizona undertook to differentiate between citizens and aliens by providing, under penalties of imprisonment and fine, that any company, corporation, partnership, association or individual, who then was or might thereafter become an employer of more than five workers, at any one time, in the State of Arizona, regardless of kind or class of work, or sex of workers, should employ not less than eighty per cent. *qualified electors or native-born citizens of the United States or some subdivision thereof.* Raich was a native of Austria and an inhabitant of Arizona, but was not a qualified elector. He was employed as a cook by Truax, who had nine employees of whom seven were neither native-born citizens of the United States nor qualified electors. A threat having been made to enforce the provisions of this statute, Raich

filed his bill in the Federal Court, asserting, among other things, that the act denied to him the equal protection of the laws. That contention was sustained, Mr. Justice Hughes saying:

> "Upon the allegations of the bill, it must be assumed that the complainant, a native of Austria, has been admitted to the United States under the Federal law. He was thus admitted with the privilege of entering and abiding in the United States, and hence of entering and abiding in any State in the Union. (*See Gegiow* v. *Uhl,* Commissioner, 239 U. S. 3.) Being lawfully an inhabitant of Arizona, the complainant is entitled under the Fourteenth Amendment to the equal protection of the laws. The description—'any person within its jurisdiction'—as it has been frequently held, includes aliens. * * * The discrimination defined by the act does not pertain to the regulation or distribution of the public domain, or of the common property or resources of the people of the State, the enjoyment of which may be limited to its citizens as against both aliens and the citizens of other States. (Citing *McCready* v. *Virginia,* 94 U. S. 391, 396 and *Patsone* v. *Pennsylvania,* 232 U. S. 138, 145, 146.) * * * The case now presented is not within these decisions, or within those relating to the devolution of real property; and it should be added that the act is not limited to persons who are engaged on public work or receive the benefit of public moneys. The discrimination here involved is imposed upon the conduct of ordinary private enterprise. * * * The purpose of an act must be found in its natural operation and effect (*Henderson* v. *Mayor,* 92 U. S. 259, 268; *Bailey* v. *Alabama,* 219 U. S. 219, 244), and the purpose of this act is not only plainly shown by its provisions, but is frankly revealed in its title. * * * It requires no

argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure. *Butchers' Union Co.* v. *Crescent City Co.*, 111 U. S. 746, 762; *Barbier* v. *Connolly*, 113 U. S. 27, 31; *Yick Wo* v. *Hopkins, supra; Allgeyer* v. *Louisiana*, 165 U. S. 578, 589, 590; *Coppage* v. *Kansas*, 236 U. S. 1, 14. If this could be refused solely on the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words. It is no answer to say, as it is argued, that the act proceeds upon the assumption that 'the employment of aliens unless restrained was a peril to the public welfare.' The discrimination against aliens in the wide range of employments to which the act relates is made an end in itself and thus the authority to deny to aliens, upon the mere fact of their alienage, the right to obtain support in the ordinary fields of labor is necessarily involved. It must also be said that reasonable classification implies action consistent with the legitimate interests of the State, and it will not be disputed that these cannot be so broadly conceived as to bring them into hostility to exclusive Federal power. The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government. *Fong Yue Ting* v. *United States*, 149 U. S. 698, 713."

In the case just considered the prohibition of the statute applied equally to all aliens, and it was held to offend against the fundamental law. In the case at bar it applies merely to some aliens. The vast majority are given the unrestricted right to acquire, possess and enjoy any possible interest in land; while a minority of aliens is denied the right of acquiring any interest whatsoever in land.

Those eligible to citizenship, even though they may never apply for the right, even though they may solemnly have disavowed the purpose of ever becoming American citizens, are placed on a complete footing of equality with native-born citizens. On the other hand, those ineligible, however ardently they may yearn for the rights of citizenship, however useful they may be to the State, however great an instrumentality for the development of its resources they may prove to be, are, by reason of the discrimination created by this legislation, literally turned off the land, unless, perchance, they should be willing to labor in a menial capacity. In fact it is only for residential and commercial purposes, it is claimed by the appellees, that land may be leased under the terms of the treaty with Japan by its subjects in the United States, as a matter of right. That would not only exclude Japanese from owning or leasing lands for agricultural purposes, but likewise for mining and other undesignated objects.

It is even contended on behalf of the State, that not only are Japanese prohibited from acquiring a leasehold or other interest in lands, but that they may not enter into a croppers agreement, which, as is shown in our brief in *Webb* v. *O'Brien*, submitted herewith, is a contract of employment.

The question is thus squarely presented, as to whether or not the State, having conferred the right upon aliens to acquire an interest in real property, may deny that right to some aliens, solely on the ground of race, color and nationality, without offending against the command of the organic law, which pledges to all persons within the jurisdiction of the State "the protection of equal laws."

The language of Mr. Justice Matthews was likewise approved and followed in *United States* v. *Wong Kim Ark*, 169 U. S. 649, where Mr. Justice Gray said:

> "Chinese persons, born out of the United States, remaining subjects of the Emperor of China, and not having become citizens of the United States, are entitled to the protection of and owe allegiance to the United States, so long as they are permitted by the United States to reside here; and are 'subject to the jurisdiction thereof,' *in the same sense as all other aliens residing in the United States.*"

Two Recent Decisions by the Supreme Court of California.

As indicative of the attitude of the Supreme Court of California, we believe it to be helpful at this stage of the argument to refer to two recent decisions of that tribunal, both based on *Yick Wo* vs. *Hopkins*, and *Truax* vs. *Raich*, and both declaring legislation discriminatory of aliens invalid under the Fourteenth Amendment; one, requiring the payment of an annual poll-tax, and the other decided on May 1, 1922, involving Section 4 of the Alien Land Law of 1920.

In *Ex parte Kotta*, 62 Cal. Dec. 315, 200 Pac. Rep. 957, the validity of a statute of California, which provided for the collection of an annual poll tax of not less than $4 on every alien male inhabitant of the State over twenty-one and under sixty years of age, except paupers, idiots and insane persons, was involved. The act was held to be violative of the equal protection clause of the Federal Constitution. In the course of the opinion of Chief Justice Angellotti, he said:

"It is settled that the word 'person' as used in this amendment includes aliens (quotting from *Yick Wo* v. *Hopkins*).

"The rights of subjects of the Emperor of China were here being discussed. In *Truax* v. *Raich*, 239 U. S. 33, decided November 1, 1915, the rights of an alien who was a citizen of Austria and resident of the State of Arizona, were involved. * * * "

"The court then quoted approvingly the portion of the opinion in *Yick Wo* v. *Hopkins, supra*, that we have quoted above. See also *Fraser* v. *McConway* (C. C.), 82 Fed. 257. Petitioner, therefore, though an alien inhabitant of California, is by this provision of the Federal Constitution guaranteed the equal protection of the laws of California."

"The meaning of 'the equal protection of the laws' thus guaranteed by the Federal Constitution to every person within the jurisdiction of a State is not left in doubt by the decisions in so far as such an act as the one here involved is concerned. In *Yick Wo* v. *Hopkins, supra*, it is said that 'the equal protection of the laws is a pledge to the protection of equal laws.' This was approvingly quoted in *Truax* v. *Raich, supra*. In *Barbier* v. *Connolly*, 113 U. S. 27, 31, the Supreme Court of the United States declared that it was undoubtedly intended thereby: 'That equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and * * * enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; *that no greater burdens should*

be laid upon one than are laid upon others in the same calling and condition.' etc. (Italics ours.) * * *

"What is said in *Barbier* v. *Connolly, supra,* and the Federal statute just quoted sufficiently shows the subject-matter as to which the alien inhabitant is given by the Constitution 'a pledge of the protection of equal laws,' laws free from discrimination based solely on his alien character. Stated very generally, the requirement is for equal protection and security for all, citizens and aliens alike, under like circumstances in the enjoyment of their personal and civil rights, and in the imposition of burdens, such as penalties, taxes, etc. * * * No question of discriminatory taxation laws was directly involved in the decisions of the Supreme Court that we have cited but the rule of these decisions is clearly applicable to such a case. In the Railroad Tax Cases (C. C.) 13 Fed. 722, Justice Field, in his opinion in the Circuit Court, said: 'The Fourteenth Amendment to the Constitution, in declaring that no State shall deny to any person within its jurisdiction the equal protection of the laws, imposes a limitation upon the exercise of all the powers of the State which can touch the individual or his property, including among them that of taxation. Whatever the State may do, it cannot deprive any one within its jurisdiction of the equal protection of the laws. * * * Unequal exactions in every form, or under any pretense, are absolutely forbidden, and of course unequal taxation, for it is in that form that oppressive burdens are usually laid.' "

See also *Ex parte Herkich Terui,* 200 Pacific Rep. 954, decided with *Ex parte Kotta,* and especially the concluding paragraphs of the opinion.

In *In re Tetsubumi Yano's Estate,* 63 Cal. Dec. 515, 206 Pac. Rep. 995, it was held by the Supreme

Court of California that Section 4 of the Alien Land Act of 1920, now under consideration, which disqualified an alien, who cannot acquire land because he cannot acquire citizenship, from acting as guardian of a ward who owns land, denied the alien the equal protection of the laws, since it deprived him of the privilege given by the Code of Civil Procedure, Section 1751, which entitled a father to preference for appointment as guardian of his minor child unless he is incompetent. The fact that an alien cannot acquire citizenship was regarded as not forming a reasonable basis for classification with respect to the right of a parent to be appointed the guardian of his minor child. In the course of its opinion the Court in terms equally applicable to all other parts of the statute, said:

> "The Initiatory Act of 1920 by its terms, forbids the appointment of any alien not eligible to citizenship as guardian of a minor, with respect to property of the minor of a character, which such alien cannot acquire for himself, that is to say, with respect to agricultural land belonging to such minor. Its effect is that a citizen of Japan, who is the parent of a native-born child, cannot be appointed guardian of the property of the child, where that property consists entirely of agricultural land. *This restriction is not put upon a citizen of any country whose citizens are eligible to citizenship here, nor upon any other class of residents of this State who are not citizens thereof. It is clearly a discrimination against citizens of Japan residing in this State.* * * * It needs no argument to demonstrate the proposition that a law which gives to one person the right or privilege of becoming the guardian of his child and withholds it from another, both being alike competent in all respects, is not equal as between the two persons. The person from whom it is with-

held is not in such a case accorded the protection of equal laws. In this respect the Initiative Act of 1920 is clearly a violation by this State of the guaranty contained in the Fourteenth Amendment, that no State shall deny to any person the equal protection of its laws. It cannot be successfully contended that the law may be declared valid in this respect on the ground that persons who are ineligible to citizenship under the laws of the United States form, by reason of that fact alone, a class by themselves, for which the State may enact peculiar legislation, depriving them of rights or privileges which are accorded to others not of that class. * * *

The right or privilege of a father to be the guardian of his own minor child does not in any respect depend upon or arise out of his nationality or his eligibility to citizenship in this country. It has no relation thereto. Such privilege is no doubt as much prized by a Japanese resident of good character, who is not a citizen of this country and cannot become such, as by any other father of like character, who is a citizen or is eligible to become one. A law denying the privilege to one class and giving it to the other cannot be said to be a law justified by a classification based on a distinction which calls for such peculiar legislation. Such attempted classification does not relieve the act from the charge that it violates the Fourteenth Amendment."

Cases Involving Discrimination Against the Chinese.

Immediately after the adoption of the Fourteenth Amendment in various of the States, and especially in California, laws were enacted directed against the Chinese inhabitants of those States, the constitutionality of which was passed

upon in the Federal Courts, and in which the Fourteenth Amendment became the rock of refuge.

In *Ho Ah Kow* v. *Nunan* (1879), 5 Sawy. 562, Mr. Justice Field had before him an ordinance of the city and county of San Francisco which declared that every male person imprisoned in the county jail under the judgment of any court having jurisdiction in criminal cases, should immediately upon his arrival at the jail have the hair of his head "cut or clipped to a uniform length of one inch from the scalp thereof," and made it the duty of the sheriff to have this provision enforced. The ordinance, which is known as the queue ordinance, was clearly directed against the Chinese only, and was regarded as hostile and discriminating legislation against a class, forbidden by the equality clause of the Constitution. The Court said:

> "The class character of this legislation is none the less manifest because of the general terms in which it is expressed. The statements of supervisors in debate on the passage of the ordinance cannot, it is true, be resorted to for the purpose of explaining the meaning of the terms used; but they can be resorted to for the purpose of ascertaining the general object of the legislation proposed, and the mischiefs sought to be remedied. Besides, we cannot shut our eyes to matters of general notoriety and general cognizance. When we take our seats on the bench we are not struck with blindness, and forbidden to know as judges what we see as men; and where an ordinance though general in its terms, only operates upon a special race, sect or class, it being universally understood that it is to be enforced only against that race, sect or class, we may justly conclude that it

was the intention of the body adopting it that it should only have such operation, and treat it accordingly. * * *

"During various periods of English history, legislation, general in its character, has often been enacted with the avowed purpose of imposing special burdens and restrictions upon Catholics; but that legislation has since been regarded as not less odious and obnoxious to animadversion than if the persons at whom it was aimed had been particularly designated.

"But in our country hostile and discriminating legislation by a state against persons of any class, sect, creed or nation, in whatever form it may be expressed, is forbidden by the Fourteenth Amendment of the Constitution. * * * And the equality of protection thus assured to every one whilst within the United States, from whatever country he may have come, or of whatever race or color he may be, implies not only that the courts of the country shall be open to him on the same terms as to all others for the security of his person or property, the prevention or redress of wrongs and the enforcement of contracts, but that no charges or burdens shall be laid upon him which are not equally borne by others, and that in the administration of criminal justice he shall suffer for his offenses no greater or different punishment."

In *In re Tiburcio Parrott*, 1 Fed. Rep. 481, decided in 1880, Article XIX, Section 2 of the California Constitution was declared to be violative of the Fourteenth Amendment. It provided:

"No corporation now existing or hereafter formed under the laws of this state shall, after the adoption of this Constitution, employ directly or indirectly, in any capacity, any Chinese or Mongolians. The legislature shall pass such laws as shall be necessary to enforce this provision."

In pursuance of this mandate, the legislature declared the employment by any officer, director, manager, stockholder, etc., of any corporation or any Chinese or Mongolian, in any capacity, a misdemeanor, punishable by imprisonment and fine.

Judge Sawyer, speaking of the statute, said:

> "It forbids the employment of Chinese. If the power to pass it exists, it might equally well have forbidden the employment of Irish, Germans, or Americans, or persons of color, or it might have required the employment of any of these classes of persons to the exclusion of the rest."

The Court then quoted Article XIX of the Constitution, which is directed against the Chinese and of which Section 2, above quoted, was a part. Section 4 of that Article provided:

> "The presence of foreigners ineligible to become citizens is declared to be dangerous to the well-being of this state, and the legislature shall discourage their immigration by all the means within its power."

After quoting from the Fourteenth Amendment and Section 1977 of the United States Revised Statutes, the opinion continues:

> "It will be seen that in the latter clause the words are 'any person,' and not 'any citizen,' and prevents any state from depriving 'any person' of life, liberty or property without due process of law, or from denying to 'any person within its jurisdiction the equal protection of the laws.' In the particulars covered by these provisions it places the right of every person within the jurisdiction of the state, be he Christian or heathen, civilized or barbarous, Caucasian or Mongolian, upon the same secure footing and under the same pro-

tection as are the rights of citizens themselves under other provisions of the Constitution; and, in consonance with these provisions, the statute enacts that 'all persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, * * * and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.' Chinese residing in California, in pursuance of the treaty stipulations, are 'persons within the jurisdiction of the state,' and 'of the United States,' and therefore within the protection of these provisions. And contracts to labor, such as all others make, are contracts which they have a 'right to make and enforce,' and the laws under which others' rights are protected are the laws to which they are entitled to the 'equal benefit,' 'as is enjoyed by white citizens.'

"It would seem that no argument should be required to show that the Chinese do not enjoy the equal benefit of the laws with citizens, or 'the equal protection of the laws,' where the laws forbid their laboring, or making and enforcing contracts to labor, in a very large field of labor which is open, without limit, let or hindrance, to all citizens, and all other foreigners, without regard to nation, race, or color. Yet, in the face of these plain provisions of the national Constitution and statutes, we find, both in the Constitution and laws of a great state and member of this Union, just such prohibitory provisions and enactments discriminating against Chinese. Argument and authority, therefore, seem still to be necessary, and fortunately we are not without either."

The Court then cites *Ho Ah Kow* v. *Nunan*, 5 Sawy. 562, and *Strauder* v. *West Virginia*, 100 U. S. 303.

In *In re Ah Chong* (1880), 2 Fed. Rep. 733, there was involved the constitutionality of a California statute, which provided: "All aliens incapable of becoming electors of this state are hereby prohibited from fishing or taking any fish, lobsters, shrimps, or shell-fish of any kind, for the purpose of selling or giving to another person to sell." A violation of the act was made a misdemeanor.

Concurrently with this statute there was passed another act, which provided for the removal outside of the limits of the cities and towns of the State of California "of any Chinese now within or hereafter to come within such limits."

There was also another contemporary enactment, which forbade the granting of any license to transact any business or occupation "to any alien not eligible to become an elector of this state."

The petitioner was arrested for taking fish in San Pablo Bay, within the State, he being an alien of the Mongolian race. It was held that the statute violated the inhibition of the Fourteenth Amendment. Judge Sawyer, after discussing *McCready* v. *Virginia*, 94 U. S. 391, on which the State relied, and recognizing the true extent of the doctrine there announced, said:

> "Citizens of other states having no property right which entitles them to fish against the will of the state, *a fortiori*, the alien, from whatever country he may come, has none whatever in the waters or the fisheries of the state. Like other privileges he enjoys as an alien by permission of the state, he can only enjoy so much as the state vouchsafes to yield to him as a special privilege. To him it is not a property right, but, in the strictest sense, a privilege or favor. To exclude the Chinaman

from fishing in the waters of the state, therefore, while the Germans, Italians, Englishmen, and Irishmen, who otherwise stand upon the same footing, are permitted to fish *ad libitum*, without price, charge, let, or hindrance, is to prevent him from enjoying the same privileges as are 'enjoyed by the citizens or subjects of the most favored nation;' and to punish him criminally for fishing in the waters of the state, while all aliens of the Caucasian race are permitted to fish freely in the same waters with impunity and without restraint, and exempt from all punishments, is to exclude him from enjoying the same immunities and exemptions 'as are enjoyed by the citizens or subjects of the most favored nation;' and such discriminations are in violation of articles 5 and 6 of the treaty with China, cited in full in Parrott's case. The same privileges which are granted to other aliens, by treaty or otherwise, are secured to the Chinaman by the stipulations of the treaty. Conceding that the state may exclude all aliens from fishing in its waters, yet if it permits one class to enjoy the privilege it must permit all others to enjoy, upon like terms, the same privileges, whose governments have treaties securing to them the enjoyment of all privileges granted to the most favored nation.

The Fourteenth Amendment of the national Constitution provides that 'no state shall * * * deny to *any person* within its jurisdiction the equal protection of the laws.' To subject the Chinese to imprisonment for fishing in the waters of the state, while aliens of all European nations under the same circumstances are exempt from any punishment whatever, is to subject the Chinese to other and entirely different punishments, pains, and penalties than those to which others are subjected, and is to deny to them the equal protection of the laws, contrary to those provisions of the Constitution. * * *

The act is clearly unconstitutional, and a violation of the treaty in discriminating against the Chinese and in favor of aliens of the Caucasian race in all other respects similarly situated. Acts when performed by Chinese are made an offence punishable by imprisonment, while the same acts, performed in the same manner and under the same circumstances, by other aliens are not an offence; and such other aliens are exempt from the punishments denounced by the law against them. It is impossible, therefore, to say that the Chinese 'enjoy the same privileges, immunities and exemptions' as are 'enjoyed by the citizens or subjects of the most favored nation,' as is stipulated they shall by the treaty, or that the 'state,' by this act, does not 'deny' to them 'the equal protection of the laws,' contrary to the Fourteenth Amendment to the national Constitution.

While it is not very likely that the act in question was *in fact* intended by its framers to apply to any but Chinese, yet, owing to carelessness in the phraseology used, others than Chinese may have occasion to invoke the national Constitution for their protection. The language is: 'All *aliens incapable* of becoming *electors* of this state are hereby prohibited from fishing,' etc. By article 2 of the Constitution the right of suffrage is limited to '*male persons;*' so that all alien women are '*incapable of becoming electors,*' and, being so, are within the terms of the statute; so that German, French, Italian, English, and Irish women, before becoming citizens, are forbidden to take fish, shrimps, lobsters, oysters, etc., in the waters of California."

In *Re Opinion of The Justices,* 207 Mass. 601, the legislature requested an opinion as to whether it had the constitutional power to enact a law making it a criminal offense for any woman under

the age of twenty-one years to enter a hotel or restaurant conducted by Chinese, or to be served with food or drink therein, or for the proprietor of any such hotel or restaurant to admit thereto a woman under the age of twenty-one years, or to serve her with food or drink therein. The question was answered in the negative on the authority of *Yick Wo* vs. *Hopkins, supra,* and In *Re Tiburcio Parrott, supra,* and other cases.

In the course of its opinion the Court said:

> "The business of keeping a hotel or restaurant, to which the proposed legislation relates, is a necessary and proper kind of business that is entitled to the protection of the laws. It may be conducted legally or illegally, by a person of any nationality. The proposed law, without reference to the way in which it is conducted, puts a restraint upon it which might be expected very seriously to interfere with the successful management of it, whenever it is carried on by a person of any particular nationality, which is not put upon it when it is carried on by a person of any other race and nationality. By the strict term of the proposed law it would be a criminal offense for a Chinese proprietor of a hotel or restaurant to permit his wife, if she was under the age of twenty-one years, or his grown-up daughter of less than that age, to enter his hotel or restaurant, or to be served with food or drink therein. This is a very great interference with the liberty of the subjects of a foreign ruler, lawfully residing within the jurisdiction of this state. It is a harmful discrimination against persons of the prescribed class, founded wholly upon their race and nationality, and it plainly falls within the constitutional prohibition quoted above. It subjects Chinese to an oppressive burden that deprives them of liberty which all others enjoy, and interferes with their

right to carry on business, acquire property, and earn a livelihood, and denies them the protection of equal laws. * * *

"This proposed legislation does not assume to forbid anything that is necessarily evil in itself, or to deal directly with any offense against order, decency, or morality. There are good hotels and bad hotels, good restaurants and bad restaurants, kept by men of the Caucasian race, and there are others of both kinds kept by men of other races. This legislation does not refer to the character or condition of the hotel or restaurant that a young woman may not enter, but refers only to the nationality of the person who conducts it. The enactment of such legislation is not a proper exercise of the police power. It has no direct relation to the evil to be remedied. It forbids the entry of a young woman into the hotel or restaurant of a Chinese proprietor, even if it is a model of orderly and moral management, and it permits the entry of young women into a hotel or restaurant kept by an American, when it is known to be maintained, in part for the promotion of immoral or criminal practices. The classification of hotels and restaurants into those that are open to young women and those that are closed to young women is not founded upon a difference that has any just or proper relation to the professed purpose of the classification. The only classification is into hotels and restaurants kept by Chinese and those kept by persons of any other nationality. * * *

"The fact that a man is white or black or yellow is not a just and constitutional ground for making certain conduct a crime in him, when it is treated as permissible and innocent in a person of a different color."

Other cases involving discriminations against Chinese which were held to be unconstitutional, are:

In re Ah Fong, 3 Sawy. 144 (1878).
Laundry Ordinance Case, 13 Fed. Rep. 229 (1882).
Gandolfo v. *Herman*, 49 Fed. Rep. 181.
In re Ty Loy, 26 Fed. Rep. 611 (1886).
In re Sam Kee, 31 Fed. Rep. 681.
In re Lee Sing, 43 Fed. Rep. 359 (1890).
Ex parte Sing Lee, 96 Cal. 354, 24 L. R. A. 196 (1892).
Ex parte Case, 20 Idaho, 128, 116 Pac. Rep. 1037.
Poon v. *Miller*, 234 S. W. Rep. 573.

In *Ex parte Case, supra,* a statute of Idaho provided that it would be thereafter unlawful for any county government, or municipal or private corporation organized under the laws of or doing business in the State "to give employment in any way to any alien who has failed, neglected or refused prior to the time such employment is given to become naturalized or to declare his intention to become a citizen of the United States." The act was held to be violative of the Fourteenth Amendment, on the authority of the cases above discussed, the Court saying:

> "A state legislature by legislative enactment or otherwise has no authority to deprive a person of the right to labor at any legitimate business or to deny any person within the jurisdiction of the United States the equal protection of the laws, or to prohibit a corporation that has a right to do business in the state to employ any person, whether alien

or native, in the prosecution of any legitimate business."

It is to be observed that the statute there interpreted unqualifiedly prohibited the employment of an alien coming within the description of the act. This differentiates the case from *Heim* v. *McCall*, 239 U. S. 175, and *People* v. *Crane*, 239 U. S. 195, affirming 214 N. Y. 154, where the statute was intended to give preferential consideration, in respect to the employment of laborers on public works, to citizens; a distinction also pointed out in the opinion of Mr. Justice Hughes in *Truax* v. *Raich*, 239 U. S. 40.

In *Poon* v. *Miller*, *supra*, decided by the Court of Civil Appeals of Texas, an act was held to be in violation of the equality clause which denied to an alien a license to engage in business as a wholesaler dealer in fish and made it a crime to be such a dealer without having procured a license. The plaintiff was a Chinaman. It was not questioned that the State had the power to regulate the sale of fish, nor that it could, under the decision in *McCready* v. *Virginia*, *supra*, limit the right to catch fish within the State to its own citizens. It was, however, held that the absolute property in captured fish passed to the person who had captured them, and that an alien thereafter acquiring them could not be prohibited from selling the fish; *Yick Wo* v. *Hopkins* and *State* v. *Montgomery* being cited in support of the decision.

Other Alien Cases.

In *Fraser* v. *McConway & Torley Co.* 82 Fed. 257, and *Juniata Limestone Company* v. *Fagley*, 187 Penn. State, 193, a statute of Pennsyl-

vania imposing a tax of three cents a day upon employers of foreign-born, unnaturalized male persons, for each day that each of such persons may be employed, and authorizing the deduction of that sum from the wages of such employes, was held to deprive the latter of the equal protection of the law.

In the first of these cases the Court in terms adopted in the second of these cases, said:

> "Evidently the act is intended to hinder the employment of foreign-born, unnaturalized male persons. The act is hostile to and discriminates against such persons. It interposes, to the pursuit by them of their lawful avocations, obstacles to which others under like circumstances are not subjected."

In *State* v. *Montgomery*, 94 Maine 192; 47 Atl. Rep. 165, an act relating to hawkers and peddlers required those who sell certain classes of goods therein named to procure a license which could only be granted to a citizen of the United States who complied with certain conditions. This was held to involve a discrimination between citizens and aliens which was obnoxious to the Fourteenth Amendment.

In the course of its opinion the Court, after discussing *Paul* v. *Virginia*, 8 Wall. 868, relating to privileges and immunities guaranteed by the Fourteenth Amendment, and *Yick Wo* v. *Hopkins*, *supra*, and other of the cases we have cited, said:

> "While it is true, as a general proposition, that, if the law deals alike with all of a certain class, it is not obnoxious to the charge of a denial of equal protection, yet it is equally true that such a classification cannot be made arbitrarily. The state may not say that all white men shall be subjected to the payment

of attorney's fees of parties successfully suing them, and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. Railway *v.* Ellis, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666. See Pearson *v.* Portland, 69 Me. 278.

In the light of these interpretations of the fourteenth amendment, we are compelled to conclude that a statute which forbids peddling except under a license, and which provides that citizens of the United States may be licensed, and that aliens shall not be, is a denial of the 'equal protection of the laws.' It is an unconstitutional discrimination against aliens. It does more than impose unequal burdens and charges upon the alien. It absolutely denies him the privilege of an occupation open to citizens, which is more than a discrimination in burdens. It does not permit the alien within our jurisdiction to pursue a business occupation and to acquire and enjoy on equal terms with the citizen. Yick Wo *v.* Hopkins, *supra.*

Nor can this discrimination be sustained as a constitutional exercise of the police power of the state. It must be noticed that the discrimination is not against a class, as criminals, as paupers, as intemperate, as disqualified by character or habits, or as harmful to society, but against a class solely as aliens. Such a discrimination is forbidden. Railway *v.* Ellis, *supra.*

And although in this case the discrimination was not injurious to the respondent, because he was not an alien and was not thereby

> prohibited from obtaining a license, still, for reasons already suggested, we think the hawkers' and peddlers' act must be regarded as invalid *in toto*. We cannot separate the constitutional part from the unconstitutional. The distinction between citizens and aliens is fundamental in the scheme for licensing."

In *Templar* v. *Board of Examiners,* 131 Mich. 254, 90 N. W. Rep. 1058, a statute which denied the right to a certificate as a licensed barber to any alien, was likewise held to be unconstitutional. The various cases in which the equality clause has been applied to those of African descent, are likewise important in this connection.

In *Vietti* v. *George K. Mackie Fuel Co.,* 109 Kansas, 179, 197 Pac. Rep. 881, it was held that a Workmen's Compensation Act which provided for a lower rate of compensation in cases where the workman does not leave any dependent citizen who resides at the time of the accident or injury in the United States or in the Dominion of Canada than in cases where he leaves dependents residing within the United States or the Dominion, violated the equality clause of the Constitution. Chief Justice Johnston said:

> "Aliens lawfully residents of the State are within the protection of this clause. The plaintiffs were lawful inhabitants of Kansas and therefore had the right to invoke the protection of the Amendment. The equality clauses of the Amendment, it has been determined, are 'universal in their application, to all persons within the territorial jurisdiction, without regard to any difference of race, of color, or of nationality.' "

Cases Affecting Negroes Under the Equality Clause.

The effect of the Amendments adopted immediately after the Civil War was first considered by this Court in the *Slaughter House Cases,* 16 Wall. 36. Referring to that historic decision, Mr. Justice Day said in *Buchanan* v. *Warley,* 245 U. S. 76:

> "The reasons for the adoption of the Amendments were elaborately considered by a court familiar with the times in which the necessity for the Amendments arose and with the circumstances which impelled their adoption. In that case Mr. Justice Miller, who spoke for the majority, pointed out that the colored race, having been freed from slavery by the Thirteenth Amendment, was raised to the dignity of citizenship and equality of civil rights by the Fourteenth Amendment, and the States were prohibited from abridging the privileges and immunities of such citizens, or depriving any person of life, liberty, or property without due process of law. While a principal purpose of the latter Amendment was to protect persons of color, the broad language used was deemed sufficient to protect all persons, white or black, against discriminatory legislation by the States. This is now the settled law. In many of the cases since arising the question of color has not been involved and the cases have been decided upon alleged violations of civil or property rights irrespective of the race or color of the complainant. In the *Slaughter House Cases* it was recognized that the chief inducement to the passage of the Amendment was the desire to extend Federal protection to the recently emancipated race from unfriendly and discriminating legislation by the States."

In *Strauder* v. *West Virginia, supra,* Mr. Justice Strong said, after referring to the equal protection clause of the Fourteenth Amendment:

> "What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race."

Applying this interpretation, it was decided that that a statute of West Virginia which read: "All white persons who are twenty-one years of age and who are citizens of this state shall be liable to serve as jurors," and which, in effect, singled out and denied to colored citizens the privilege of serving as jurors, was a denial of the equal protection of the laws.

In *Ex parte Virginia,* 100 U. S. 339, 345, the same doctrine was applied, the Court, referring to the Amendments, saying:

> "They were intended to take away all possibility of oppression by law because of race or color. They were intended to be, what they

really are, limitations of the power of the States and enlargements of the power of Congress."

Following the rule laid down in these cases are:

Neal v. *Delaware*, 103 U. S. 370.
Gibson v. *Mississippi*, 162 U. S. 565.
Williams v. *Mississippi*, 170 U. S. 213.
Carter v. *Texas*, 177 U. S. 442.
Rogers v. *Alabama*, 192 U. S. 226.
Martin v. *Texas*, 200 U. S. 316.

Commenting on some of these cases, Mr. Justice Harlan, in *Kentucky* v. *Powers*, 201 U. S. 32, said:

> "The cases to which we have adverted had reference, it is true, to alleged discriminations against negroes because of their race. But the rules announced in them equally apply where the accused is of the white race. Section 641, as well as the Fourteenth Amendment of the Constitution, is for the benefit of all, of every race, whose cases are embraced by its provisions and not alone for the benefit of the African race."

In *McCabe* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 235 U. S. 151, the Oklahoma stage-coach law was held unconstitutional because it discriminated against persons of the African race, in that it permitted carriers to provide sleeping cars, dining cars and chair cars to be used exclusively by persons of the white race and required no such provision for those of the African race; distinguishing *Plessy* v. *Ferguson*, 163 U. S. 537, and other similar cases, in which it was decided that it was not an infraction of the Fourteenth Amendment for a State to require separate, *but equal*, accommodations for the two races.

In *Buchanan* v. *Warley*, 245 U. S. 60, a city ordinance which forbade colored persons to occupy houses in blocks where the greater part of the houses were occupied by white persons, and which, in practical effect, prevented the sale of lots in such blocks to colored persons, was declared to be unconstitutional. Mr. Justice Day, speaking for a unanimous Court, after referring to the Thirteenth and Fourteenth Amendments and Section 1977 of the United States Revised Statutes, said:

> "In the face of these constitutional and statutory provisions, can a white man be denied, consistently with due process of law, the right to dispose of his property to a purchaser by prohibiting the occupation of it for the sole reason that the purchaser is a person of color intending to occupy the premises as a place of residence? * * * These enactments did not deal with the social rights of men, but with those fundamental rights in property which it was intended to secure upon the same terms to citizens of every race and color. *Civil Rights Cases*, 109 U. S. 3, 22. The Fourteenth Amendment and these statutes enacted in furtherance of its purpose operate to qualify and entitle a colored man to acquire property without State legislation discriminating against him solely because of color. * * *
>
> As we have seen, this court has held laws valid which separated the races on the basis of equal accommodations in public conveyances, and courts of high authority have held enactments lawful which provide for separation in the public schools of white and colored pupils where equal privileges are given. But in view of the rights secured by the Fourteenth Amendment to the Federal Constitution such legislation must have its limitations, and cannot be sustained where the exercise of authority exceeds the restraints of the Constitution. We think these limitations are exceeded in

laws and ordinances of the character now before us.

It is the purpose of such enactments, and, it is frankly avowed it will be their ultimate effect, to require by law, at least in residential districts, the compulsory separation of the races on account of color. Such action is said to be essential to the maintenance of the purity of the races, although it is to be noted in the ordinance under consideration that the employment of colored servants in white families is permitted, and nearby residences of colored persons not coming within the blocks, as defined in the ordinance, are not prohibited.

The case presented does not deal with an attempt to prohibit the amalgamation of the races. The right which the ordinance annulled was the civil right of a white man to dispose of his property if he saw fit to do so to a person of color and of a colored person to make such disposition to a white person.

It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution.

It is said that such acquisitions by colored persons depreciate property owned in the neighborhood by white persons. But property may be acquired by undesirable white neighbors or put to disagreeable though lawful use with like results."

It is true that, in the case just cited, the parties concerned were citizens, and that the Court especially referred to the due process clause of the Constitution. Yet that provision is not confined, in its application, to citizens, and, as has been frequently observed, its purpose is so cognate with that of the equality clause that both are interchangeably applied.

Viewing the California Alien Land Law in the light of the decisions which have interpreted the equality clause in cases which do not relate to the discrimination of individuals or classes on account of race, color or nationality, it will be helpful to refer to the familiar cases which are constantly brought to the attention of this Court, merely by way of a reminder.

Other Decisions Under the Equality Clause.

The elaborate discussion of the subject by Mr. Justice Field in the *Railroad Tax Cases,* 13 Fed. Rep. 722, has become an inherent part of our constitutional law. Referring to the contention that the prohibition of the Fourteenth Amendment was limited to members of the race enfranchised immediately before its adoption, that great Judge said:

> "It has a much broader operation. It does not, indeed, place any limit upon the subjects in reference to which the States may legislate. It does not interfere with their police power. Upon every matter upon which previously to its adoption they could act, they may still act. They can legislate now, as they always could, to promote the health, good order, and peace of the community; to develop their resources, increase their industries, and advance their prosperity; *but it does require that in all such legislation hostile and partial discrimination against any class or person shall be avoided; that the State shall impose no greater burdens upon any one than upon others of the community under like circumstances, nor deprive any one of rights which others similarly situated are allowed to enjoy. It forbids the State to lay its hand more heavily upon one than upon another under*

like conditions. It stands in the Constitution as a perpetual shield against all unequal and partial legislation by the States, and the injustice which follows from it, whether directed against the most humble or the most powerful; against the despised laborer from China, or the envied master of millions."

In *County of Santa Clara* v. *Southern Pacific R. Co.*, 18 Fed. Rep. 385, Mr. Justice Field, again dealing with the same question, and especially in the aspect of it which related to the singling out of the property of railroad companies and subjecting them to discriminating taxation through the medium of a change in the State Constitution, said:

"The principle which justifies such a discrimination in assessment and taxation, where one of the owners is a railroad corporation and the other a natural person, would also sustain it where both owners are natural persons. A mere change in the State Constitution would effect this if the Federal Constitution does not forbid it. Any difference between the owners, whether of age, color, race, or sex, which the State might designate, would be a sufficient reason for the discrimination. It would be a singular comment upon the weakness and character of our republican institutions if the valuation and consequent taxation of property could vary according as the owner is white, or black, or yellow, or old, or young, or male or female. A classification of values for taxation upon any such ground would be abhorrent to all notions of equality, of right, among men. Strangely, indeed, would the law sound in case it read that in the assessment and taxation of property a deduction should be made for mortgages thereon if the property be owned by white men or by old men, and not deducted if owned

by black men or by young men; deducted if owned by landsmen, not deducted if owned by sailors; deducted if owned by married men, not deducted if owned by bachelors; deducted if owned by men doing business alone, not deducted if owned by men doing business in partnerships or other associations; deducted if owned by trading corporations, not deducted if owned by churches or universities; and so on, making a discrimination whenever there was any difference in the character or pursuit or condition of the owner. To levy taxes upon a valuation of property thus made is of the very essence of tyranny, and has never been done except by bad governments in evil times, execising arbitrary and despotic power."

In the course of the opinion the language used by Senator Edmunds in his argument in the *San Mateo Case* before this Court is quoted, in which he pointed out that the purpose of the long consideration that was given to this measure by its framers was that protection against injustice and oppression should be made forever secure—"secure, not according to the passion of Vermont, or of Rhode Island, or of California, depending upon their local tribunals for its efficient exercise, but secure as the right of a Roman was secure, in every province and in every place, and secure by the judicial power, the legislative power, and the executive power of the whole body of the States and the whole body of the people."

The concurring opinion of Judge Sawyer abounds in further quotations from the argument of Senator Edmunds which are convincing in their force and clarity.

That decision was affirmed by this Court in 118 U. S. 394.

In *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis*, 165 U. S. 150, the limitations upon the power of the legislature to classify were thus stated by Mr. Justice Brewer:

> "But it is said that it is not within the scope of the Fourteenth Amendment to withhold from States the power of classification, and that if the law deals alike with all of a certain class it is not obnoxious to the charge of a denial of equal protection. While, as a general proposition, this is undeniably true, * * * yet it is equally true that such classification cannot be made arbitrarily. *The State may not say that all white men shall be subjected to the payment of the attorneys' fees of parties successfully suing them and all black men not.* It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. * * * Unless the legislature may arbitrarily select one corporation or one class of corporations, one individual or one class of individuals, and visit a penalty upon them which is not imposed upon others guilty of like delinquency this statute cannot be sustained. But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this."

The opinion then quotes the words of Mr. Justice Matthews in *Yick Wo* v. *Hopkins* which we have already quoted, with the remark that "no language is more worthy of frequent and thoughtful consideration than these words."

The principle laid down in the case just cited has recently been reiterated in *Atchison, Topeka & Santa Fe Ry. Co.* v. *Vosberg,* 238 U. S. 56.

This phase of the argument may be most appropriately concluded by a reference to *Truax* v. *Corrigan,* 257 U. S. 312, where a statute of Arizona which specially exempted ex-employees, when committing tortious and other irreparable injury to the business of their former employer, from restraint by injunction, while leaving subject to such restraint all other tort-feasors engaged in like wrongdoing, was declared to be unreasonable and a violation of the equality clause. Not because the members of the Court are not fully aware of the reasoning which led to this result, but because it so effectively formulates the principle on which we rely, do we venture to quote at some length from the opinion of the Chief Justice:

> "Our whole system of law is predicated on the general, fundamental principle of equality of the application of the law. 'All men are equal before the law,' 'This is a government of laws and not of men,' 'No man is above the law,' are all maxims showing the spirit in which legislatures, executives and courts are expected to make, execute and apply the laws. But the framers and adopters of this Amendment were not content to depend on a mere minimum secured by the due process clause, or upon the spirit of equality which might not be insisted on by local public opinion. They therefore embodied that spirit in a specific guaranty.
>
> The guaranty was aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality, on the other. It sought an equality of treatment of all persons, even though all enjoyed the protection of due proc-

ess. Mr. Justice Field, delivering the opinion of this court in *Barbier* v. *Connolly*, 113 U. S. 27, 32, of the equality clause, said—'Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.' In *Hayes* v. *Missouri*, 120 U. S. 68, the court speaking through the same Justice said the Fourteenth Amendment 'does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.' Thus the guaranty was intended to secure equality of protection not only for all but against all similarly situated. Indeed, protection is not protection unless it does so. Immunity granted to a class, however limited, having the effect to deprive another class, however limited, of a personal or property right, is just as clearly a denial of equal protection of the laws to the latter class as if the immunity were in favor of, or the deprivation of right permitted worked against a larger class.

Mr. Justice Matthews, in *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369, speaking for the court of both the due process and the equality clause of the Fourteenth Amendment, said:

> 'These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; *and the equal protection of the laws is a pledge of the protection of equal laws.*'

> The accuracy and comprehenstive felicity of this description of the effect of the equality clause are shown by the frequency with which it has been quoted in the decisions of this court. It emphasizes the additional guaranty of a right which the clause has conferred beyond the requirement of due process."

The opinion later refers to *Missouri* v. *Lewis*, 101 U. S. 22, from which the following quotation is made:

> "For, as before said, it [i. e., the equality clause] has respect to persons and classes of persons. It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances."

The subject of classification is then taken up, and the following quotation is made from the opinion in *Southern Railway Co.* v. *Greene*, 216 U. S. 400, 417:

> "While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis."

The opinion of the Chief Justice then continues:

> "Classification is the most inveterate of our reasoning processes. We can scarcely think or speak without consciously or unconsciously exercising it. It must therefore obtain in and determine legislation; but it must regard real resemblances and real differences between

> things, and persons, and class them in accordance with their pertinence to the purpose in hand. Classification like the one with which we are here dealing is said to be the development of the philosophic thought of the world and is opening the door to legalized experiment. When fundamental rights are thus attempted to be taken away, however, we may well subject such experiment to attentive judgment. The Constitution was intended, its very purpose was, to prevent experimentation with the fundamental rights of the individual. We said through Mr. Justice Brewer, in *Muller* v. *Oregon*, 208 U. S. 412, that 'it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government, which otherwise would be lacking.' "

In the case at bar we have sought to show, by the interpretation given to the equality clause of the Fourteenth Amendment almost contemporaneously with its adoption, that whatever classification might be justified, it was contrary to the permeating spirit of the provision that there should be no classification on the basis of color, race, or nationality; that such classification was opposed to the primary purpose of the new Amendments, and especially of the equality clause, and that, hence, there is no room for any legislative experimentation such as that embodied in the California Alien Land Law, which is at war with the fundamental rights of the individual guaranteed by that precious grant, conferred not merely upon citizens, but upon all persons within the jurisdiction of the State.

A mere reference to other well-known cases bearing upon this subject will suffice:

Cotting v. *Kansas City Stock Yards Co.*, 183 U. S. 79.

Connolly v. *Union Sewer Pipe Co.*, 184 U. S. 500.

Raymond v. *Chicago Union Traction Co.*, 207 U. S. 42.

Smith v. *Texas*, 233 U. S. 630.

Gast Realty Co. v. *Schneider Granite Co.*, 240 U. S. 55.

Royster Guano Co. v. *Virginia*, 253 U. S. 412.

Kansas City So. Ry. Co. v. *Road Improvement District No. 6*, 256 U. S. 658.

State v. *Julow*, 129 Mo. 163, 29 L. R. A. 257.

In the last of these cases Mr. Justice Sherwood, referring to a statute which restricted the right to discharge laborers because of membership in labor unions, said:

> "The legislature may legislate in regard to a class of persons, but they cannot take what may be termed a natural class of persons, split that class in two, and then arbitrarily designate the dissevered fractions of the original unit as two classes, and enact different rules for the government of each. This would be a mere arbitrary classification without any basis of reason on which to rest, and would resemble a classification of men by the color of their hair or other individual peculiarities, something not competent for the legislature to do."

The application of this idea to the case at bar is obvious. Recognizing the right of the State to classify the ownership of an interest in real prop-

erty so as to differentiate between citizens and aliens, a further classification of aliens—a natural class of persons—into two or more classes, namely, those eligible to citizenship under the laws of the United States and those not so eligible, is an arbitrary classification, especially when, on analysis, it is found to be based on the color of the skin of the respective classes of aliens and is intended to discriminate against those of a particular nationality.

If the act had provided that all aliens except Frenchmen might acquire the ownership of land or of an interest in real property in California, it would be hard to believe that such a classification could be upheld. If it could not be in the case of a Frenchman, is there any defensible reason for making such an exception in the case of Japanese or Chinese? If that could not be done, then the use of a phrase which clearly marks Japanese and Chinese as excepted from the benefits and advantages secured to all other aliens, must similarly offend against the spirit of the equality clause, and deprive them, when within the jurisdiction of the State of California, of the equal protection of the laws.

In an article published in 23 *Yale Journal*, 328, immediately after the passage of the California Alien Land Law of 1913, the author, in the course of his discussion of that legislation, said:

> "Does eligibility to citizenship form a sufficient basis for classification in view of these decisions? And does it strengthen the case of the State that this classification is based proximately on the treaty rights of the alien affected? The problem finally resolves itself into this question, Can persons within the jurisdiction of the State be put into a class

by themselves because, for any reason whatever, they cannot become citizens, and thus subjected to special legislation imposing burdens not imposed upon other persons? In the opinion of the writer they cannot. The California law will within all probability be declared void, because to uphold it would limit the protection of the Fourteenth Amendment to citizens and to those eligible to citizenship. To hold otherwise would mean a new departure by the Supreme Court and the way would then be opened up for making classifications based upon the possession or lack of possession of other political privileges."

CASES RELIED ON BY APPELLEES.

(1.) *Patsone* v. *Pennsylvania*, 232 U. S. 138, is claimed to sustain this legislation.

The act there under review made it unlawful for unnaturalized foreign-born residents to kill wild game except in defense of person or property, and to that end made the possession of shot guns and rifles unlawful. The opinion, however, shows that the lawful object of this legislation was conceived to be the protection of wild life within the State. That being so, the discrimination made between citizens and aliens and the means adopted for making it effective did not offend against the Constitution. It was pointed out that the prohibition of the possession of rifles was peculiarly appropriate to the forbidden use. The prohibition did not extend to weapons such as pistols, which might be supposed to be needed occasionally for self-defense. And the opinion concludes with the admonition that it is to be remembered that the subject under discussion was wild game, which the State might preserve for the use of its own citi-

zens if it so pleased; *Geer* v. *Connecticut*, 161 U. S. 519, being cited in support of this proposition.

In *Truax* v. *Raich, supra,* this case and *McCready* v. *Virginia, supra,* were relied upon as a justification for the legislation there under criticism. Mr. Justice Hughes, however, pointed out the manifest distinction between those cases and *Truax* v. *Raich,* which we also believe differentiates them from the case at bar. He said:

> "The discrimination defined by the act does not pertain to the regulation or distribution of the public domain, or of the common property or resources of the people of the State, the enjoyment of which may be limited to its citizens as against both aliens and the citizens of other States. Thus in *McCready* v. *Virginia*, 94 U. S. 391, 396, the restriction to the citizens of Virginia of the right to plant oysters in one of its rivers was sustained upon the ground that the regulation related to the common property of the citizens of the State, and an analogous principle was involved in *Patsone* v. *Pennsylvania*, 232 U. S. 138, 145, 146, where the discrimination against aliens upheld by the court had for its object the protection of wild game within the State with respect to which it was said that the State could exercise its preserving power for the benefit of its own citizens if it pleased. The case now presented is not within these decisions, or within those relating to the devolution of real property (*Hauenstein* v. *Lynham*, 100 U. S. 483; *Blythe* v. *Hinckley*, 180 U. S. 333, 341, 342); and it should be added that the act is not limited to persons who are engaged on public work or receive the benefit of public moneys."

The same distinction was pointed out in the opinion of Judge Cardozo in *People* v. *Crane*, 214 N. Y. at pages 161, 162.

If, in *Patsone* v. *Pennsylvania, supra,* the act, instead of making its inhibition general in its scope by declaring it unlawful for "any unnaturalized foreign-born resident to kill any wild bird or animal," and "to that end" making it unlawful "for such foreign-born person to own or be possessed of a shot gun or rifle," had been limited to an unnaturalized Italian or Englishman, it is believed that a different conclusion would have been reached.

(2.) In *Quong Wing* v. *Kirkendall,* 223 U. S. 59, which has also been cited, a statute of Montana imposed a license fee on hand laundries, which was not applied to steam laundries, and which exempted from its operation laundries employing not more than two women. There was no reference in the statute to the race, color or nationality of the persons who were affected by the legislation, although the possibility of such a motive did not escape the Court, and which, had it existed, it is evident might have led to a different conclusion, for Mr. Justice Holmes says:

> "Another difficulty suggested by the statute is that it is impossible not to ask whether it is not aimed at the Chinese; *which would be a discrimination that the Constitution does not allow. Yick Wo* v. *Hopkins,* 118 U. S. 356. It is a matter of common observation that hand laundry work is a widespread occupation of Chinamen in this country while on the other hand it is so rare to see men of our race engaged in it that many of us would be unable to say that they ever had observed a case. *But this ground of objection was not urged and rather was disclaimed when it was mentioned from the Bench at the argument.* It may or may not be that if the facts were called to our attention in a proper way the objection would prove to be real. But even if when

called to our attention the facts should be taken notice of judicially, whether because they are only the premise for a general proposition of law, * * * or for any other reason, still there are many things that courts would notice if brought before them that beforehand they do not know. It rests with counsel to take the proper steps, and if they deliberately omit them, we do not feel called upon to institute inquiries on our own account. Laws frequently are enforced which the court recognizes as possibly or probably invalid if attacked by a different interest or in a different way. Therefore, without prejudice to the question that we have suggested, when it shall be raised, we must conclude that so far as the present case is concerned the judgment must be affirmed."

(3.) The Court below rested its decision on *Terrace* and *Nakatsuka* v. *Thompson*, 274 Fed. Rep. 841, which arose under an act of the legislature of the State of Washington (Ch. 50, Laws of Washington, 1921), commonly known as the Alien Land Bill. By the terms of that act it was provided:

"Sec. 2. An alien shall not own land or take or hold title thereto. No person shall take or hold land or title to land for an alien. Land now held by or for aliens in violation of the constitution of the state is forfeited to and declared to be the property of the state. Land hereafter conveyed to or for the use of aliens in violation of the constitution or of this act shall thereby be forfeited to and become the property of the state."

Section 1 of the act defines the word "alien" as follows:

> "(a) 'Alien' does not include an alien who has in good faith declared his intention to become a citizen of the United States, but does include all other aliens and all corporations and other organized groups of persons a majority of whose capital stock is owned or controlled by aliens or a majority of whose members are aliens."

The Constitution of the State of Washington provides (Art. II, § 33):

> "The ownership of land by aliens, other than those who in good faith have declared their intention to become citizens of the United States, is prohibited in this state, except where acquired by inheritance, under mortgage, or in good faith in the ordinary course of justice in the collection of debts; and all conveyances of lands hereafter made to any alien directly, or in trust for such alien, shall be void: provided, That the provisions of this section shall not apply to lands containing valuable deposits of minerals, metals, iron, coal, or fire clay, and the necessary land for mills and machinery to be used in the development thereof and the manufacture of the products therefrom. Every corporation, the majority of the capital stock of which is owned by aliens, shall be considered an alien for the purposes of this prohibition."

The bill in that case alleged that the complainant Terrace was the owner of certain lands in the State of Washington and desired to lease them to the complainant Nakatsuka, a subject of Japan, who was negotiating for the lease, he being engaged in farming and trading in farm products at wholesale and retail, but that the lease would be prevented by the defendants by reason of the provisions of the act referred to. The major part

of the opinion is devoted to a consideration of the treaty between the United States and Japan, which, in view of the argument that we are presenting in the case at bar, is of no moment.

As indicating, however, a palpable distinction between that case and the present, we call attention to the comment of Judge Cushman, who wrote the opinion in *Terrace* v. *Thompson*, at page 847, where, after quoting the definition of "alien" as contained in the act, he says:

> "The prohibition by this definition is made applicable to all aliens, both those eligible and those not eligible to citizenship, provided they have not declared their intention to become citizens. To this extent, the present suit is to be distinguished from *In re Ah Chong*, 2 Fed. 733."

Judge Cushman then quotes from the opinion of Judge Sawyer in *In re Ah Chong* the passages which we have quoted *supra*, and then continues:

> "The present case is not only to be distinguished from the Chong Case because of the fact that the present law is made applicable to all aliens and there is no punishment by imprisonment or fine of the alien grantee of lands, but the case is to be further distinguished because of the fact that the treaty with Japan does not contain, as to land ownership, the 'most favored nation' clause or any language of such import."

The opinion then refers to *Guinn and Beal* v. *United States*, 238 U. S. 347, and *Myers* v. *Anderson*, 238 U. S. 368 (which arose under the grandfathers' clause contained in the Oklahoma Constitution), and says that they have no application to the present controversy, "for," the opinion con-

tinues, "if it be granted that the present law is aimed primarily at the so-called yellow or brown races of the Orient, the result is the same. There is no restriction upon the authority of Congress to discriminate in the matter of the eligibility of an alien to become a citizen because of color. The Fifteenth Amendment provides that the right of a citizen of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude. The Fourteenth Amendment made the negroes citizens. It is obvious that the objection on the part of Congress is not due to color, as color, but only to color as an evidence of a type of civilization which it characterizes. The yellow or brown racial color is the hall-mark of Oriental despotisms, or was at the time the original naturalization law was enacted."

The difficulty with this statement is that we are not dealing with congressional legislation. We have already stated that there is no limitation upon the power of Congress with respect to the conditions on which naturalization may be conferred. We are now dealing, however, with State legislation, which the Fourteenth Amendment subjects to important limitations.

The opinion continues:

> "It is this disqualification put upon them by the Federal Government to which the State objects, and not their color, although the Federal Government may have made their race color the irrefutable evidence of disqualification for citizenship."

Here, again, we repeat that Congress could discriminate as it desired, arbitrarily or otherwise, in regard to the grant of citizenship. The State,

however, cannot discriminate arbitrarily between the aliens within its jurisdiction, who have been guaranteed the equal protection of the law, by saying that aliens who are white or of African descent may acquire real property or an interest therein, while those who are yellow or brown may not.

The opinion proceeds (p. 849):

> "It is obvious that one who is not a citizen and cannot become one lacks an interest in, and the power to effectually work for the welfare of, the State, and, so lacking, the State may rightfully deny him the right to own and lease real estate within its boundaries."

That is a forced conclusion. The same assertion might be made in support of a law which would debar an alien from acquiring personal property, or forbid him from engaging in any of the usual occupations or employments.

Similarly the remark which immediately follows fails to justify such legislation:

> "If one incapable of citizenship may lease or own real estate, it is within the realm of possibility that every foot of land within the State might pass to the ownership or possession of non-citizens."

Applying this language to the California Alien Land Law, aliens who never intend to become citizens and aliens who are non-residents, might lease or own every foot of land within the State merely because they are eligible to citizenship. If the argument, applied directly to the Washington Alien Land Bill, has any merit, then it points out a material difference between that act and the California law, and serves to demonstrate that

whatever may be said of the former, the latter is an example of arbitrary selection, and not of permissible classification.

Furthermore, the Washington act applies to any alien, even though he be eligible to citizenship, who has not in good faith declared his intention to become a citizen of the United States, and who, as indicated by Section 6 of the act, is to be presumed to have declared his intention in bad faith if, after having declared his intention to become a citizen, he is not admitted to citizenship within seven years after the making of his declaration.

(4.) In the opinion of Judge Dooling in the case at bar, after referring to *Terrace* v. *Thompson*, it is said:

> "It is true that Congress has the power arbitrarily to say who may be naturalized and that exercising such power it has limited the right of naturalization to 'aliens' being free white persons; and to aliens of African 'nativity and to persons of African descent.' This limitataion excludes three of the five great races of the world, the yellow, the brown and the red. And while such exclusion is in a sense arbitrary, it is not without foundation in reason, and has been in effect, except for a brief period, practically during the existence of our government. In any event, once established, however arbitrarily, and so long as it continues, it furnishes a fundamental and important distinction which may well be adopted by a state in determining who may not own land within its borders."

Does not this statement involve a serious confusion of thought? It not only fails to differentiate between Federal and State legislation, to recognize the absence of limitation upon congressional action, and the existence of definite re-

strictions upon State action, but conceding as arbitrary the exclusion from the right to acquire an interest in real property in California of aliens who are yellow and brown, while the absolute right to acquire real property is conferred on aliens who are white or black, it nevertheless upholds such arbitrary selection in the very face of the repeated denunciations by this Court of classification bearing such a character.

It is also difficult to understand, in the light of what this Court has so repeatedly declared to be the test of the unconstitutionality of classification, how arbitrary selection can be regarded as reasonable, to the extent of nullifying the operation of the equality clause of the Fourteenth Amendment.

According to the argument propounded, if Congress had prohibited the immigration into this country of any person over forty years of age, an alien exceeding that age might be prohibited by the Legislature of California from acquiring an interest in real property, even though all aliens under forty years of age are permitted to acquire the ownership of realty.

II.

The act is likewise unconstitutional because it deprives Porterfield, who is a citizen of the United States, of the right to enter into contracts for the leasing of his realty, and because it deprives Mizuno of his liberty and property by debarring him from entering into a contract for the purpose of earning a livelihood in a lawful occupation.

The effect of this statute is to deprive the Japanese aliens in California of the right to earn

their livelihood in agricultural pursuits, in any other than a menial capacity. Nobody would claim that an act forbidding a British, French or Italian alien from conducting a laundry, a tailor shop, or a restaurant, could be upheld; nor would an act which would prohibit a citizen of the United States from leasing his realty to a British, French or Italian alien seeking to carry on a laundry, a tailor shop or a restaurant, be regarded otherwise than as a deprivation of his liberty and property without due process of law. Can it be said that, because a statute makes it unlawful for a citizen to lease his realty to a Japanese alien, and prohibits the latter from entering into a contract for such a lease, whilst such a lease may be entered into with a Dane, Swede or Norwegian, a different interpretation is to be given to the Constitution?

This aspect of the case accentuates the proposition that the act under review operates as a denial of the equal protection of the law. It is only another illustration, however, of the fact that the due process and equality clauses of the Fourteenth Amendment frequently do intermingle and melt into one another when it becomes necessary to determine the constitutionality of a legislative act possessing the characteristics of the California Alien Land Law, that the decisions under those clauses apply interchangeably.

It is believed that *Yick Wo* v. *Hopkins, supra, Truax* v. *Raich, supra, Butchers' Union, &c. Co.* v. *Crescent City Co.,* 111 U. S. 746, *Allgeyer* v. *Louisiana,* 165 U. S. 578, 589, 590, *Smith* v. *Texas,* 233 U. S. 630, and *Coppage* v. *Kansas,* 236 U. S. 1, sustain this proposition.

III.

It is respectfully submitted that the order of the District Court should be reversed and the case remanded with instructions to grant the injunction prayed for by the appellants.

LOUIS MARSHALL,
Appellants' Counsel.

APPENDIX A.

Alien Land Law. (Act No. 156.)

An act relating to the rights, powers and disabilities of aliens and of certain companies, associations and corporations with respect to property in this state, providing for escheats in certain cases, prescribing the procedure therein, requiring reports of certain property holdings to facilitate the enforcement of this act, prescribing penalties for violation of the provisions hereof, and repealing all acts or parts of acts inconsistent or in conflict herewith.

Submitted by the initiative and approved by electors November 2, 1920. In effect December 9, 1920.

The people of the State of California do enact as follows:

Rights of aliens eligible to citizenship.

Section 1. All aliens eligible to citizenship under the laws of the United States may acquire, possess, enjoy, transmit and inherit real property, or any interest therein, in this state, in the same manner and to the same extent as citizens of the United States, except as otherwise provided by the laws of this state.

Rights of other aliens.

Sec. 2. All aliens other than those mentioned in section one of this act may acquire, possess, enjoy and transfer real property, or any interest therein, in this state, in the manner and to the extent and for the purpose prescribed by any treaty now existing between the government of the United States and the nation or country of which

such alien is a citizen or subject, and not otherwise.

Corporations.

SEC. 3. Any company, association or corporation organized under the laws of this or any other state or nation, of which a majority of the members are aliens other than those specified in section one of this act, or in which a majority of the issued capital stock is owned by such aliens, may acquire, possess, enjoy and convey real property, or any interest therein, in this state, in the manner and to the extent and for the purposes prescribed by any treaty now existing between the government of the United States and the nation or country of which such members or stockholders are citizens or subjects, and not otherwise. Hereafter all aliens other than those specified in section one hereof may become members of or acquire shares of stock in any company, association or corporation that is or may be authorized to acquire, possess, enjoy or convey agricultural land, in the manner and to the extent and for the purposes prescribed by any treaty now existing between the government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise.

Appointment as guardian.

SEC. 4. Hereafter no alien mentioned in section two hereof and no company, association or corporation mentioned in section three hereof, may be appointed guardian of that portion of the estate of a minor which consists of property which such alien or such company, association or corporation is inhibited from acquiring, possessing, enjoying or transferring by reason of the provisions of this act. The public administrator of the proper county, or any other competent person or corpo-

ration, may be appointed guardian of the estate of a minor citizen whose parents are ineligible to appointment under the provision of this section.

On such notice to the guardian as the court may require, the superior court may remove the guardian of such an estate whenever it appears to the satisfaction of the court:

(a) That the guardian has failed to file the report required by the provisions of section five hereof; or

(b) That the property of the ward has not been or is not being administered with due regard to the primary interest of the ward; or

(c) That facts exist which would make the guardian ineligible to appointment in the first instance; or

(d) That facts establishing any other legal ground for removal exist.

"Trustee."

SEC. 5. *(a)* The term "trustee" as used in this section means any person, company, association or corporation that as guardian, trustee, attorney-in-fact or agent, or in any other capacity has the title, custody or control of property, or some interest therein, belonging to an alien mentioned in section two hereof, or to the minor child of such an alien, if the property is of such a character that such alien is inhibited from acquiring, possessing, enjoying or transferring it.

Annual report.

(b) Annually on or before the thirty-first day of January every such trustee must file in the office of the Secretary of State of California and in the office of the county clerk of each county in which any of the property is situated, a verified written report showing:

(1) The property, real or personal, held by him for or on behalf of such an alien or minor;

(2) A statement showing the date when each item of such property came into his possession or control.

(3) An itemized account of all expenditures, investments, rents, issues and profits in respect to the administration and control of such property with particular reference to holdings of corporate stock and leases, cropping contracts and other agreements in respect to land and the handling or sale of products thereof.

(c) Any person, company, association or corporation that violates any Provision in this section, is guilty of a misdemeanor and shall be punished by a fine not exceeding one thousand dollars or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment.

(d) The provisions of this section are cumulative and are not intended to change the jurisdiction or the rules of practice of courts of justice.

Sale when heir cannot take real property.

SEC. 6. Whenever it appears to the court in any probate proceeding that by reason of the provisions of this act any heir or devisee cannot take real property in this state or membership or shares of stock in a company, association or corporation which, but for said provisions, said heir or devisee would take as such, the court, instead of ordering a distribution of such property to such heir or devisee, shall order a sale of said property to be made in the manner provided by law for probate sales of property and the proceeds of such sale shall be distributed to such heir or devisee in lieu of such property.

Escheat of property acquired in fee.

SEC. 7. Any real property hereafter acquired in fee in violation of the provisions of this act by any alien mentioned in section two of this act, or by any company, association or corporation mentioned in section three of this act, shall escheat to, and become and remain the property of the State of California. The Attorney General or district attorney of the proper county shall institute proceedings to have the escheat of such real property adjudged and enforced in the manner provided by section four hundred seventy-four of the Political Code and title eight, part three of the Code of Civil Procedure. Upon the entry of final judgment in such proceedings, the title to such real property shall pass to the State of California. The provisions of this section and of sections two and three of this act shall not apply to any real property hereafter acquired in the enforcement or in satisfaction of any lien now existing upon, or interest in such property, so long as such real property so acquired shall remain the property of the alien, company, association or corporation acquiring the same in such manner. No alien, company, association or corporation mentioned in section two or section three hereof shall hold for a longer period than two years, the possession of any agricultural land acquired in the enforcement of or in satisfaction of a mortgage or other lien hereafter made or acquired in good faith to secure a debt.

Agricultural land.

Escheat of leasehold.

SEC. 8. Any leasehold or other interest in real property less than the fee, hereafter acquired in violation of the provisions of this act by any alien mentioned in section two of this act, or by any company, association or corporation mentioned in section three of this act, shall escheat to the State

of California. The Attorney-General or district attorney of the proper county shall institute proceedings to have such escheat adjudged and enforced as provided in section seven of this act. In such proceedings the court shall determine and adjudge the value of such leasehold or other interest in such real property, and enter judgment for the state for the amount thereof together with costs. Thereupon the court shall order a sale of the real property covered by such leasehold, or other interest, in the manner provided by section twelve hundred seventy-one of the Code of Civil Procedure. Out of the proceeds arising from such sale, the amount of the judgment rendered for the state shall be paid into the state treasury and the balance shall be deposited with and distributed by the court in accordance with the interest of the parties therein. Any share of stock or the interest of any member in a company, association or corporation hereafter acquired in violation of the provisions of section three of this act shall escheat to the State of California. Such escheat shall be adjudged and enforced in the same manner as provided in this section for the escheat of a leasehold or other interest in real property less than the fee.

Escheat of stock.

Conveyance to prevent escheat.

SEC. 9. Every transfer of real property, or of an interest therein, though colorable in form, shall be void as to the state and the interest thereby conveyed or sought to be conveyed shall escheat to the state if the property interest involved is of such a character that an alien mentioned in section two hereof is inhibited from acquiring, possessing, enjoying or transferring it, and if the conveyance is made with intent to prevent, evade or avoid escheat as provided for herein.

A prima facie presumption that the conveyance is made with such intent shall arise upon proof of any of the following groups of facts:

(*a*) The taking of the property in the name of a person other than the persons mentioned in section two hereof if the consideration is paid or agreed or understood to be paid by an alien mentioned in section two hereof:

(*b*) The taking of the property in the name of a company, association or corporation, if the memberships or shares of stock therein held by aliens mentioned in section two hereof, together with the memberships or shares of stock held by others but paid for or agreed or understood to be paid for by such aliens, would amount to a majority of the membership or the issued capital stock of such company, association or corporation;

(*c*) The execution of a mortgage in favor of an alien mentioned in section two hereof if said mortgage is given possession, control or management of the property.

The enumeration in this section of certain presumptions shall not be so construed as to preclude other presumptions or inferences that reasonably may be made as to the existence of intent to prevent, evade or avoid escheat as provided for herein.

Penalty for conspiracy to effect illegal transfer.

SEC. 10. If two or more persons conspire to effect a transfer of real property, or of an interest therein, in violation of the provisions hereof, they are punishable by imprisonment in the county jail or state penitentiary not exceeding two years, or by a fine not exceeding five thousand dollars, or both.

SEC. 11. Nothing in this act shall be construed as a limitation upon the power of the state to enact laws with respect to the acquisition, holding or disposal by aliens of real property in this state.

Repealed provisos.

SEC. 12. All acts and parts of acts inconsistent or in conflict with the provisions hereof are hereby repealed; provided, that—

(*a*) This act shall not affect pending actions or proceedings, but the same may be prosecuted and defended with the same effect as if this act had not been adopted;

(*b*) No cause of action arising under any law of this state shall be affected by reason of the adoption of this act whether an action or proceeding has been instituted thereon at the time of the taking effect of this act or not and actions may be brought upon such causes in the same manner, under the same terms and conditions, and with the same effect as if this act had not been adopted;

(*c*) This act in so far as it does not add to, take from or alter an existing law shall be construed as a continuation thereof.

Amendment.

SEC. 13. The legislature may amend this act in furtherance of its purpose and to facilitate its operation.

Constitutionality.

SEC. 14. If any section, subsection, sentence, clause or phrase of this act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this act. The people hereby declare that they would have passed this act, and each section, subsection, sentence, clause and phrase thereof, irrespective of the fact that any one or more other sections, subsections, sentences, clauses or phrases be declared unconstitutional.

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"It is obvious that one who is not a citizen and can not become one lacks an interest in, and the power to effectually work for the welfare of the State, and, so lacking, the State may rightfully deny him the right to own and lease real estate within its boundaries. If one incapable of citizenship may lease or own real estate, it is within the realm of possibility that every foot of land within the State might pass to the ownership or possession of noncitizens. Such a result would leave the foundation of the State but a pale shadow, and the structure erected thereon but a Tower of Babel from which the tenants in possession might, when the shock of war came, bow themselves out because they were not bound as citizens to defend the house in which they lodged."

(From Opinion of United States District Court, Western District of Washington, Southern Division, "*Terrace et al., Complainants,* vs. *Thompson, as Attorney General of the State of Washington, Defendant,*" July 25, 1921, 274 Fed. at pp. 849-850.)

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1922.

No. 299

W. L. PORTERFIELD and
Y. MIZUNO,

Appellants,

vs.

U. S. WEBB, as Attorney General of the State of California, and THOMAS LEE WOOLWINE, as District Attorney of the County of Los Angeles,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR APPELLEES.

NOTE: Attached as an appendix hereto are the following exhibits:

"Exhibit A"—California Alien Land Act of 1920;
"Exhibit B"—Washington Alien Land Act of 1921;
"Exhibit C"—United States-Japan Treaty of 1911.

STATEMENT OF THE CASE.

This is an appeal from an order denying an application for an interlocutory injunction, heard and

decided by the District Court of the United States for the Southern District of California, specially constituted and held by Honorable William H. Hunt, Circuit Judge, and Honorable Benj. F. Bledsoe and Honorable M. T. Dooling, District Judges, under the provisions of the act of June 18, 1910, 36 Stat. 557, U. S. Comp. Stat., Sec. 1243. The opinion and order denying the application was filed on December 19, 1921. (*Porterfield et al.* vs. *Webb, etc., et al.*, 279 Fed., 114.) The action is brought to enjoin and restrain the Attorney General of the State of California, and the District Attorney of the County of Los Angeles, from enforcing the so-called California Alien Land Law, which was adopted by the initiative on November 2, 1920. (Stat. of California 1921, page lxxxiii.) A copy of the said act is annexed as "Exhibit A" to this brief.

There are numerous assignments of error specified (Tr. pp. 13 to 16), but they all center around and are the basis for the contention of appellants that the provisions of the Alien Land Law of the State of California, prohibiting the leasing of agricultural lands to an alien ineligible to citizenship in the United States, are in violation of the Fourteenth Amendment to the Constitution of the United States, and deprive the appellant, Mizuno, a subject of the Empire of Japan, of rights, privileges and immunities secured for him under the treaty of February 21, 1911, between the United States and the Empire of Japan. Also, that the act violates sections 1977 and 2164 of

the Revised Statutes of the United States. The bill of complaint in this case alleges that Porterfield is a citizen of the United States and of the State of California; that he owns real estate located in the County of Los Angeles, State of California, particularly adapted to raising vegetables; that Mizuno is a capable farmer and a desirable person to become a tenant of said real estate; that Porterfield desires to lease said real estate to Mizuno for a period of five years, and Mizuno desires to accept such lease.

Paragraph V of the complaint sets forth that said plaintiff, Mizuno, in addition to being a capable farmer is "engaged in the business of trading, wholesale and retail, in farm products, and, instead of purchasing such farm products, he desires to produce his own farm products for the purpose of selling them in the wholesale and retail trade, and if he is prevented from leasing land for the purpose of producing such products for such trade, he will be prevented from engaging in trade and the incidents to trade as he is authorized so to do under the treaty hereinafter mentioned." (Tr. page 3.)

This allegation is obviously made for the purpose of claiming that the parties plaintiff are entitled to the protection of those provisions of the treaty with Japan which state that the citizens or subjects of the two contracting parties shall have liberty to carry on trade, wholesale and retail, in the territories of the other.

The bill then contains the usual allegations that the defendants, Webb, as Attorney General of the State

of California, and Woolwine, as District Attorney of the County of Los Angeles, in said state, have threatened to, and will, enforce the so-called Alien Land Law against the plaintiffs in the event that they enter into a lease of said real estate, for the purpose and terms aforesaid, and will by escheat proceedings forfeit or attempt to forfeit the leasehold interest to the State of California, and will prosecute the plaintiffs criminally for alleged violation of the act, and that the act is, in its terms, so drastic and the penalties attached to a violation thereof are so great that neither of these plaintiffs may make or execute such lease, even for the purpose of testing the constitutionality or validity of said act, and that unless the court shall determine the validity of said act in this proceeding, the plaintiffs will be compelled to submit to the act, whether the same be valid or invalid, and thereby be deprived of their property without due process of law, and denied the equal protection of the laws, in contravention of the Fourteenth Amendment of the Federal Constitution. Section 8 of the California act provides for the escheat of such a leasehold interest. Section 10 provides for criminal proceedings against those violating the act. The bill prays for an interlocutory injunction prohibiting and restraining the said Attorney General and the said District Attorney from bringing, or permitting to be brought, any proceedings at law or in equity for the purpose of enforcing said act against the plaintiffs, or either of them, or from causing the plaintiffs, or

either of them, to be arrested, etc. (Tr. page 3, paragraph VI of bill of complaint, and page 5, paragraph XIV.)

The District Court entertained jurisdiction of this case, and after a full hearing and with a well considered opinion written by District Judge Dooling, and following the opinion of the United States District Court of the State of Washington, by Circuit Judge Gilbert and District Judges Cushman and Neterer, involving and deciding precisely the same question as presented in the case at bar (*Terrace et al.* vs. *Thompson,* 274 Fed. 841), denied the application for a preliminary injunction. (Tr., pp. 9 to 11.)

This *Porterfield* case is the so-called "lease" case which is to be heard before the court at the same time as the "cropping contract" case of *U. S. Webb, etc., et al.* vs. *J. J. O'Brien et al.,* October Term, 1922, No. 267 (279 Fed. 117), and the case of *Terrace* vs. *Thompson, supra.* The *Porterfield* case involves the question of the validity of the California Alien Land Act in its relation to the United States Constitution and the United States-Japan Treaty. The *O'Brien* case involves the question of whether the cropping contract entered into between the citizen land owner and the ineligible alien in that case amounts to a violation of the California Alien Land Act.

A motion has been made by appellants in the other case of *Frick* vs. *Webb,* No. 555, October term, 1922, to advance the argument in said case to November 27,

1922, when the *Porterfield,* the *O'Brien* and the *Terrace* cases are to be argued. The *Frick* case involves that section of the California act which prohibits ownership of shares of stock by an ineligible alien, in a landowning corporation.

In this *Porterfield* case we have not had the usual advantage of examining brief for appellants before preparing this brief. We are, nevertheless, forwarding our brief to the court, in order to conform to the court rule as we understand it.

ARGUMENT.

I.

THE ALIEN LAND LAW OF CALIFORNIA DOES NOT VIOLATE THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. THE STATE HAS THE FUNDAMENTAL RIGHT TO PROHIBIT ALIEN OWNERSHIP, POSSESSION, DOMINION OVER OR ENJOYMENT OF LAND. THE FOURTEENTH AMENDMENT WAS NEVER INTENDED TO AFFECT THIS RIGHT.

The Fourteenth Amendment to the United States Constitution provides in section 1 thereof that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

The citizen plaintiff Porterfield is entitled to claim the protection of all of the Fourteenth Amendment above quoted, and the alien plaintiff Mizuno is entitled to claim the protection only of that part which prohibits any state depriving any person of life, liberty or property, without due process of law, or denying to any person within its jurisdiction the equal protection of the law.

The Alien Land Act of California, which, it is claimed, violates the provisions of the Fourteenth Amendment, states in section 1 thereof that

> "All aliens eligible to citizenship under the laws of the United States may acquire, possess, enjoy, transmit and inherit real property, or any interest therein, in this state in the same manner and to the same extent as citizens of the United States, except as otherwise provided by the laws of this state."

Section 2 provides that

> "All aliens other than those mentioned in section 1 of this act may acquire, possess, enjoy and transfer real property, or any interest therein, in this state, in the manner and to the extent and for the purpose prescribed by any treaty now existing between the government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise."

The decisive answer to any claim, either by a citizen or a noncitizen, to the protection of the Fourteenth Amendment in a case such as is now before the court, is that the amendment was never intended to deprive

the states of the Union of their inherent and unquestioned power to control in matters of ownership or other interests in lands, when a question of an alien securing such interests is involved.

Paragraph XI of the bill of complaint (Tr. folio 5) charges that the California Land Act is unreasonable, arbitrary, capricious, inequitable and unjust, and that it is made to depend upon difference of race.

We insist, however, that this act in plain terms affords to every alien who is capable of becoming a citizen full rights of ownership and interest in our land, and to every other alien such rights as his nation enables him to obtain by the provisions of any treaty between his country and this country.

There can be no discrimination, inequality, unreasonableness, capriciousness or arbitrary injustice in this method of providing for the rights of aliens in this country, or in the states that compose it.

Surely also the operation of the provisions of this law is in no respect made to depend upon difference of race, for differences of race are entirely eliminated by the liberal provisions of section 2 of the act.

Fully applicable to this contention, and decisive of it, is the judicial determination long since made and continuously maintained, that where all persons of a class are treated alike by any legislative enactment, it is not obnoxious to the provisions of the Fourteenth Amendment of the United States Con-

stitution, or indeed to any other constitutional limitations.

As was most aptly and clearly enunciated by the Supreme Court of the United States, in *Perley* vs. *North Carolina,* 249 U. S. 510, 514, the general principles applicable to alleged discriminatory statutes and the constitutional inhibition thereof are well defined. In that case the court said:

> "We concede the aphorism upon which counsel relies that, 'The equal protection of the laws is a pledge of the protection of equal laws.' We, on March 24th last, by an almost prescience of the contention now based on it, defined its extent and declared that the Fourteenth Amendment, which is the foundation of the aphorism, does not regard the impracticable, and that distinctions may be made by the legislation between objects or persons, and that the power of the state 'may be determined by the degrees of evil already exercised where detriment is especially experienced.' Moreover we pointed out that the deference due to the judgment of the legislature in the matter had been emphasized again and again.
>
> *Hebe Co.* vs. *Shaw,* 248 U. S. 297, 307;
>
> *Dominion Hotel* vs. *Arizona,* 249 U. S. 265."

See

Moody vs. *Hagen,* 162 N. W. 704.

Before proceeding with a consideration of the provisions of the treaty of 1911 between the United States and Japan and the provisions of the California Alien Land Law, the constitutionality of

which is challenged in this action, it seems advisable to collate the latest definition and exposition by this court of the meaning of the term "equal protection of the laws," granted by the Fourteenth Amendment, and to note the limitations of that term.

It is obvious that the due process of law required by the Fourteenth Amendment has no application to the subject matter of this case. Probably it will not be invoked on behalf of the appellants. A statute which provides, as does the California act, that leasehold interests created in contravention thereof, and, as we claim, of the treaty itself, can not be escheated or forfeited without an action in court brought for that purpose, does not infringe upon the due process of law clause of the constitution.

The appellants point to the provisions of section 2 of the California act which deny to aliens who can not become naturalized citizens of the United States the right to acquire or hold real property or any interest therein, while the provisions of section 1 of the said act extend those rights to aliens who can be so naturalized. This is claimed to be an arbitrary, unjust and unequal restriction and a violation of the constitutional provision guaranteeing the equal protection of the laws to all persons, whether citizens or aliens.

The meaning of the expression "equal protection of the laws" has been many times considered by this court. For the purpose of this case we deem it sufficient to refer to the latest exposition of the meaning

of that expression by Mr. Chief Justice Taft in the case of

Truax vs. *Corrigan,* decided Dec. 19, 1921, 42 Supreme Court Reports, 124,

and also to the dissenting opinions filed in that case by Mr. Justice Brandeis, Mr. Justice Pitney and Mr. Justice Holmes. All of these justices agreed on the definition of the term "equal protection of the law," and differed only as to its application to the question then before the court, which was the validity of an Arizona statute referring to injunctions in cases involving or growing out of a dispute concerning terms or conditions of employment. All these opinions and the cases cited and quoted therein agreed with the statement of the effect of the equality clause given by Mr. Justice Matthews in *Yick Wo* vs. *Hopkins,* 118 U. S. 356, at 369, which was called by Mr. Chief Justice Taft a description of "accuracy and comprehensive felicity." It is as follows:

> "These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws."

These opinions also concur with the statement of the limitation of the term "equal protection of the

laws" given by Mr. Justice Bradley in *Missouri* vs. *Lewis*, 101 U. S. 22, 31, in which he declared as follows:

> "For, as before said, it (*i.e.*, the equality clause) has respect to persons and classes of persons. It means that no person or class of persons shall be denied the same protection of the law which is enjoyed by other persons or other classes in the same place and under like circumstances."

And again, as stated by Mr. Chief Justice Taft, at page 131:

> "Classification must be reasonable. As was said in *Gulf Ry. Co.* vs. *Ellis*, 165 U. S. 155, * * * 'Classification * * * must always rest upon some difference which bears a reasonable and just relation to the act, in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.'
>
> "As was said in *Magoun* vs. *Ill. Trust Bank*, 170 U. S. 283, 293 * * * 'the rule (*i.e.*, of the equality clause) is not a substitute for municipal law. It only prescribes that that law have the attribute of equality of operation, and equality * * * does not mean indiscriminate operation on persons merely as such, but on persons according to their relations.'
>
> "The same principle is repeated and enforced in *Southern Ry. Co.* vs. *Greene*, 216 U. S. 400, 417, * * * 'While reasonable classification is permitted without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction bearing a

reasonable and just relation to the things in respect to which such classification is imposed; and classification can not be arbitrarily made without any substantial basis.' "

Mr. Chief Justice Taft proceeds as follows:

"Classification is the most inveterate of our reasoning processes. We can scarcely think or speak without consciously or unconsciously exercising it. It must, therefore, obtain in and determine legislation; but it must regard real resemblances and real differences between things and persons, and class them in accordance with their pertinence to the purpose in hand."

And again, as said by Mr. Justice Pitney in his dissenting opinion, page 144:

"The familiar expression in *Barbier* vs. *Connolly,* 133 U. S. 27, * * * 'class legislation discriminating against some, and favoring others,' refers to a discrimination which at the same time favors others similarly situated. The same is true of what was said in *Hayes* vs. *Missouri,* 120 U. S. 68, 71–72, * * * to the effect that the amendment 'merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.' Other decisions are to the same effect."

And again as said by Mr. Justice Brandeis in the same case, at page 134:

"Few laws are of universal application. It is of the nature of our law that it has dealt, not with man in general, but with him in relationships.

> That a peculiar relationship of individuals may furnish legal basis for the classification which satisfies the requirement of the Fourteenth Amendment is clear."

And in a note to his statement of this general principle, he cites in support of it numerous cases.

We are guided, then, by the light of these fundamental principles, determining the meaning and the limitations of the broad guarantee of "equal protection of the laws," given by the Fourteenth Amendment. We maintain that the provisions of the California statute which grant to aliens who may become naturalized citizens the right to acquire and hold real estate or an interest therein and which deny those rights to all other aliens except and until such rights are conferred upon them by treaty, are fair and just provisions of law, fully warranted and required by the subject matter embraced in the statute and the "peculiar relationships" of the individuals affected by it. Aliens who can not become naturalized American citizens certainly are not in the same class and category as are all other aliens who may become such citizens.

It seems clear that a state statute which relegates to the treaty-making power of the United States the determination of what rights should be allowed to aliens to acquire and hold real estate or an interest therein in such state is a very liberal and wise statute and one in the interest of the entire people of this great country, and in the further interest of the

authority of the central government under the Federal Constitution upon which alone the treaty power has been conferred as well as the power to determine what aliens may or may not acquire citizenship.

The provisions of the Fourteenth Amendment were never intended as a guaranty that the same law would be applied to all persons, and, happily, the courts have uniformly so held. In applying that guaranty to persons such persons may be grouped or classified and different legislation applied to the different groups or classes. There must be found to exist such differences between the person so arranged in groups or classes as to warrant such grouping or classification and these differences must be such as to justify and make proper the application of different legislative treatment to the respective groups or classes.

It is not the right of each person to demand the same legislative treatment that is accorded to every other person. The rule is satisfied in its entirety if the person is given the same legislative treatment that every other person in his class is accorded.

If there exists a reason for dividing people into two classes as (1) citizens, and (2) aliens, in respect of a particular subject matter of legislation, it is also competent to apply to those classes different legislative treatment. If there exists an equally good reason for again dividing either of these divisions into classes, it is equally competent to apply to those classes different legislative treatment.

The classification adopted in the California Alien Land Act is (1) aliens eligible to citizenship, and (2)

aliens not eligible to citizenship. The first class owes allegiance to the state and to the nation. Experience of more than a century has shown that large numbers from the first class do assume the burdens, duties and responsibilities of citizenship, severing their allegiance from the old and swearing allegiance to their new government. The classification of this statute leaves that opportunity open and encourages its exercise. The second class, irrespective of their desires, can never become citizens of this government or free themselves from the obligations and allegiance to their own government. They can never become the support and dependence of this nation but remain the support, maintenance and dependence of their own government. They are and must continue to be aliens unassimilated and unassimilable and in full harmony, sympathy and accord with their own government when the call to arms comes. They are, and must by reason of their allegiance remain, not only aliens within our borders, but enemies when the nations are in conflict. As is so well said by the court in the *Terrace* case (274 Fed. at pp. 849–50):

> "It is obvious that one who is not a citizen and can not become one lacks an interest in, and the power to effectually work for the welfare of the State, and, so lacking, the State may rightfully deny him the right to own and lease real estate within its boundaries. If one incapable of citizenship may lease or own real estate, it is within the realm of possibility that every foot of land within the State might pass to the ownership or possession of noncitizens. Such a result would

leave the foundation of the State but a pale shadow, and the structure erected thereon but a Tower of Babel from which the tenants in possession might, when the shock of war came, bow themselves out because they were not bound as citizens to defend the house in which they lodged."

The court in the *Terrace* case, *supra,* cited to the point that

"A state may lawfully prohibit aliens acquiring land within its boundaries, if there is no treaty to the contrary";

Chirac vs. *Chirac,* 2 Wheat. 259, 272;
Hauenstein vs. *Lynham,* 100 U. S. 483, 484;
DeVaughan vs. *Hutchinson,* 165 U. S. 566, at 570;
Clarke vs. *Clarke,* 178 U. S. 186;
Blythe vs. *Hinckley,* 180 U. S. 333.

The court in the *Terrace* case, *supra,* states that:

"Tribal laws of the progenitors of the Anglo-Saxons, while still upon the continent, made an estate in lands, similar to a freehold, a prerequisite to a voice in the tribal government. The 'free-neckedman,' or 'freeman' was synonymous with 'freeholder.' They were interdependent. A freeman had a vote in determining tribal policies and no one was a freeman without an estate in lands. (Green's History of the English People, Book 1, Chap. 1, subhead 'The Land.') The recognition of this principle has run throughout the history of our race and its government." (Page 850.)

Lord Coke, in 19th Ed. Butler & Hargrave, Book 1, Chap. 1, Sec. 2*a*, of Coke upon Littleton, states the rule as follows:

> "If an alien Christian or infidel purchase houses, lands, tenements, or hereditaments to him and his heires, albeit he can have no heires, yet he is of capacitie to take a fee simple but not to hold. For upon an office found, the king shall have it by his prerogative of whomsoever the land is holden. And so it is if the alien doth purchase land and die, the law doth cast the freehold and inheritance upon the king. If an alien purchase any estate of freehold in houses, lands, tenements or hereditaments, the king upon office found shall have them."

Blackstone, Volume 1, at page 372 of his Commentaries states the rule as follows:

> "An alien born may purchase lands, or other estates; but not for his own use; for the king is thereupon entitled to them. If an alien could acquire a permanent property in lands, he must owe an allegiance, equally permanent with that property, to the king of England; which would probably be inconsistent with that, which he owes to his own natural liege lord; besides that thereby the nation might in time be subject to foreign influence, and feel many other inconveniences."

See also

2 Kent's Comm. 14th Ed. 53–64;
Kerr, Real Property, 215 *et seq.*;
Tiffany, Real Property, 2350;

1 Stimson's Am. St. Law, 6013;
Stephens Comm. on Law of England, Vol. I, 330;
Sedgwick, Trial of Title, 226;
Washburn, Real Property, 131.
Fairfax vs. *Hunter's Lessee,* 7 Cranch, 603.

In

Chirac vs. *Chirac,* 2 Wheat. 259,

the United States Supreme Court accepted, without dissent, the point made by the plaintiff in error, that in the absence of a treaty the property of the deceased went to the state "because it was acquired before he became a citizen of the United States."

See

Orr vs. *Hodgson,* 4 Wheat. 453.

In

Hauenstein vs. *Lynham,* 100 U. S. 483,

Fairfax vs. *Hunter's Lessee,* 7 Cranch, 603, *supra,* is affirmed, and the court says at page 484:

> "The law of nations recognizes the liberty of every government to give to foreigners only such rights to immovable property within its territory, as it may see fit to concede. Vattel, Book 2, Chap. 8, Sec. 114. In our country, this authority is primarily in the states where the property is situated."

In

United States vs. *Repentigny,* 72 U. S. 211,

it was held that Congress might by general act divest aliens of any rights which they might have in real estate instead of requiring judicial proceedings.

See also

Blythe vs. *Hinckley,* 180 U. S. 333;
Geofrey vs. *Riggs,* 133 U. S. 258;
Donaldson vs. *State,* 101 N. E. 485;
Jones vs. *Jones,* 234 U. S. 615.

The only exception which the common law made was in cases of leases made *for the habitation of a merchant.*

Lord Coke, in 19th Ed., Butler & Hargrave, Book 1, Chap. 1, Sec. 2b, subhead "fee simple," Coke upon Littleton, states the rule as follows:

> "But as to a lease for yeares, there is a diversitie betweene a lease for yeares of a house for the habitation of a merchant stranger being an alien, whose king is in league with ours, and a lease for yeares of lands, meadows, pastures, woods and the like. For if he take a lease for yeares of lands, meadows, etc. upon office found, the king shall have it. But of a house for habitation he may take a lease for yeares as incident to commerce; for without habitation he cannot merchandise or trade. But if he depart, or relinquish the realme, the king shall have the lease. So it is if he die possessed thereof, neither his executors or administrators shall have it, but the king; for he had it only for habitation as necessary to his trade or traffique and not for the benefit of his executor or administrator. But if the alien be no merchant, then the king shall have the lease for yeares, albeit it were for his habitation; and so it is if he be an alien enemie. And all this was so resolved by the

judges assembled together for that purpose in the case of Sir James Croft, Pasch. 29, of the raigne of queene Elizabeth."

The modern application of the Common Law rule, dating back to the time of the Year Books, that the only title which an alien could acquire to real property was a title subject to defeasance by the sovereign, could not be better expressed than it is by the court in the *Terrace* case. After quoting language expressive of the enormous change that has taken place in the last two generations in international relationships, the court says:

"The sympathetic and temperate view here expressed, no doubt, should restrain us from forcing our civilization upon alien-types. Yet it lessens no jot or tittle the duty of the court to hold impregnable the barrier erected by Congress to preserve, in its purity, our own type of civilization. The more homogeneous its parts, the more perfect the union. It may be that the changes wrought in the Orient in the last fifty or seventy-five years now warrant a different policy; but there is no law or treaty that yet has said 'the twain shall meet,' or that, if citizenship be accorded these Orientals, the danger is past of our becoming a 'mechanical medley of race fragments.' (Page 849.)"

Secretary of State Bryan, in his diplomatic correspondence with the Japanese Ambassador, following the enactment of the earlier California Alien Land Law of 1913, expressed the necessity for the fundamental doctrine of a nation's control of its land

tenure in the following convincing language, in his communication of July 16, 1913, to the Japanese Ambassador (Papers Relating to the Foreign Relations of the United States, 1913, Department of State, United States of America, at page 641):

> "I am quite prepared to admit that all differences between human beings—differences in appearance, differences in manner, differences in speech, differences in opinion, differences in nationality, and differences in race—may provoke a certain antagonism; but none of these differences is likely to produce serious results unless it becomes associated with an interest of a contentious nature, such as that of the struggle for existence. In this economic contest the division no doubt may often take place on racial lines, but it does so not because of racial antagonism but because of the circumstance that the traditions and habits of different races have developed or diminished competitive efficiency. The contest is economic; the racial difference is a mere mark or incident of the economic struggle.
>
> "All nations recognize this fact, and it is for this reason that each nation is permitted to determine who shall and who shall not be permitted to settle in its dominions and become a part of the body politic, to the end that it may preserve internal peace and avoid the contentions which are so likely to disturb the harmony of international relations."

The position of California and the Western states generally on the practical and absolute necessity for its alien land legislation could not be better expressed

than in the above quotation from Secretary of State Bryan's diplomatic correspondence. It is a wise statesmanship guiding the international relations of the two countries which recognizes the inevitable economic struggle with its attendant fatal results that must ensue in the absence of such legislation.

The fundamental question is not one of race discrimination. It is a question of recognizing the obvious fact that the American farm, with its historical associations of cultivation, environment, and including the home life of its occupants, can not exist in competition with a farm developed by Orientals with their totally different standards and ideas of cultivation of the soil, of living and social conditions.

If the Oriental farmer is the more efficient, from the standpoint of soil production, there is just that much greater certainty of an economic conflict which it is the duty of statesmen to avoid.

The conservative and intelligent statesmen of Japan have recognized this truth just as fully as have those of America. It is far better to have an occasional outburst from extremists who refuse to recognize the underlying reason for such legislation, than to permit of a condition that would lead to results far more serious from the standpoint of the friendly relations of the two nations.

Rights to land ownership and to citizenship in any country must depend on the judgment of the statesmen of that country. These are problems which throughout the years of international relationships

between governments have been settled by each nation for itself. Such must continue to be the rule if we are to have any permanency of amicable relationships between the peoples of the different countries. The people of the Western states of America, in full recognition of every treaty right guaranteed to the subjects of other nations, have accepted a classification created by the Federal government itself in an attempt to secure those conditions of land dominion, possession and enjoyment which must exist if strife and serious friction are to be avoided.

For the rule that the state may prohibit alien ownership of land see:

State vs. *Sitacheli*, 192 Pac. 991 (Supreme Court of Washington).

The United States District Court, Southern Division, Northern District of California, in the case of

Frick vs. *Webb*, 281 Fed. 407,

held that the California Alien Land Act does not violate either the United States Constitution or the United States-Japan Treaty of 1911.

The California Supreme Court made the same ruling in the case of

Ex Parte Akado, 207 Pac. 245.

An alien may inherit land or take by law only by grace of the state within the boundaries of which the lands are situate.

In re Colbert's Estate, 119 Pac. 791 (Supreme Court of Montana).

B. COMPARISON OF CALIFORNIA ALIEN LAND LAW AND WASHINGTON ALIEN LAND LAW, AS RELATED TO THIS FUNDAMENTAL RIGHT DETERMINED BY THE UNITED STATES COURTS IN THE TWO STATES.

The bill in the *Terrace* case alleged that the complainants Terrace, owners of certain land, desired to lease such lands to the complainant Nakatsuka, a subject of Japan, who desired to lease said lands from them, and that the subject of Japan was engaged in farming, and trading, wholesale and retail, in farm products. The Alien Land Bill of the State of Washington forbade such a lease, and it is alleged in the complaint that this law is contrary to the Fourteenth Amendment to the Constitution of the United States. The Alien Land Law of the State of Washington is Chapter 50 of the Laws of Washington, 1921. (Appendix, Exhibit B.)

For the purposes of this case the following are the only distinctions of interest between the California and the Washington Alien Land Laws.

Section 1 of the California law provides that all aliens eligible to citizenship under the laws of the United States, whether they have or have not applied for citizenship, may "acquire, possess, enjoy, transmit and inherit real property, or any interest therein."

Section 2 provides that all aliens other than those mentioned in section 1, that is, all aliens ineligible to citizenship, may have the same interest in real property as referred to in section 1 only as prescribed by

any treaty between this government and another country of which such alien is a citizen or subject.

Section 3 of the California law places companies, associations and corporations of which a majority of the members are aliens ineligible to citizenship or in which a majority of the issued capital stock is owned by such aliens, in the same category as the persons ineligible to citizenship, described in section 2.

Section 2 of the Washington act provides that no alien, whether eligible to citizenship or not so eligible, shall own land or take or hold title thereto.

Section 1, subdivision (*a*), however, makes an exception in the case of an alien who has in good faith declared his intention to become a citizen of the United States.

Said subdivision (*a*) of section 1 also creates the same classification as we have in the California act for corporations and other organized groups of persons a majority of whose capital stock is owned or controlled by aliens, or a majority of whose members are aliens.

Subdivision (*b*) of section 1 of the Washington act makes certain exceptions in favor of the alien with which we are not here concerned, referring to lands containing mineral deposits, etc., and also provides, as an exception, the

> "right to the possession, use or enjoyment of land for a period of not more than ten years for a purpose for which an alien is accorded the use of

land by a treaty between the United States and the country whereof he is a citizen."

We see, then, that for the purposes of the principles involved in the case at bar, the two statutes can not be distinguished.

The essential differences between them are:

First: In California only aliens ineligible to citizenship are barred from the right to interests in lands, while in Washington all aliens, including those eligible to citizenship, are so barred. In this respect the Washington act bars a larger general group of aliens than does the California act.

Second: In California an eligible alien my acquire interests in land, even though he has not declared his intention to become a citizen. In Washington such an eligible alien would not be entitled to such an interest in land unless he has declared his intention of becoming a citizen. In this respect the Washington act again includes a larger class as not entitled to acquire rights in realty. That is, with reference to eligible aliens, there are some that are barred. In California none are barred.

Third: In the Washington act leasehold interests limited to ten years are allowed to any alien, provided that the treaty with the country of which the alien is a citizen grants the enjoyment of such land for some purpose. In California, on the other hand, there is no attempted limitation of any kind against aliens who are accorded rights in realty by treaty regulations. Here again, the Washington act

attempts to bar a larger class of aliens than does the California act. In Washington all aliens, citizens of a country accorded by treaty agreement certain rights in realty, are limited in these rights to a term of ten years. In California the identical aliens would not be limited at all, but would be accorded every right that the treaty attempts to confer.

Reviewing these distinctions, it is easily shown that in so far as the California statute differs from the Washington act it is supported by the logical reasoning showing the fundamental consideration involved in this entire subject matter as discussed in the *Terrace* case, decided by the United States District Court in Washington.

The first distinction above noted is to the effect that in California the only aliens barred from acquiring interest in land are those who are ineligible to citizenship. This is certainly a natural classification. The fundamental reasoning of the *Terrace* case is to the effect that the inherent principle that has been handed down throughout the history of international relations from the days of the year books of the common law is the security of all nations in their international relationships. The first rule of each nation must be the rule of self-preservation. This rule demands that each nation be permitted to decree who shall own and have interest in its lands. A country that would permit of its very soil, which is the life-giving foundation of the state, being owned by persons who owe allegiance to

a foreign sovereignty would be inviting ultimate annihilation. Of all aliens, therefore, who on this principle should be barred from acquiring interest in land those who can not renounce their foreign allegiance and become citizens of our country are the ones that the State should deal with. An alien who is eligible to citizenship might be encouraged to become a citizen of this country, and such encouragement can not be better made than by inviting him to acquire land here, set up his home here, and in that way become so interested in the internal affairs of the United States as to lead to a desire that he become a citizen thereof and in this way renounce his allegiance to a foreign state.

This leads us to the second distinction noted above, which is that in California an alien eligible to citizenship may acquire an interest in land even though he has not declared his intention of becoming a citizen. In Washington he must so declare before he has this right. As noted above, the California law is based on the soundest of reasoning, in that by so permitting the eligible alien to hold lands in this state, even though he has not applied for citizenship, California is encouraging him to finally become a citizen of this country.

Every intendment, in other words, of the California statute is to finally consummate the gathering together of our foreign population into our own American family, to the end that the security of the nation might be guaranteed, which is the first and

primary duty of those who would properly guard and perpetuate the national life.

The third distinction above noted is of no immediate interest in this case. We should observe, however, that the California statute so much more carefully respects and recognizes all treaty rights.

The court, in the *Terrace* case, addressing itself to the point raised, that the prohibition to the *landowner* disposing of his property to the alien is a violation of the Fourteenth Amendment, used the following language, at pages 846–7:

> "The citizen landowner may sell to whom he pleases; but he may not sell to one who is rightfully forbidden the right to buy.
>
> "That the Fourteenth Amendment was not intended as an instrument to accomplish the end here sought, is shown by legislation early enacted by Congress to give effect to the Fourteenth Amendment, the primary purpose of which was the enfranchisement of the slaves.
>
> *Slaughter-House Cases,* 16 Wall. (83 U. S.) 36; *Buchanan* vs. *Warley,* 245 U. S. 60, at 76 and 78.
>
> "By the amendment, members of the enfranchised race were made citizens of the nation and state of their residence, a privilege at present denied to the subjects of Japan.
>
> "In giving legislative aid to these constitutional provisions Congress enacted in 1866, Ch. 31, Sec. 1, 14 Stat. 27 (Rev. Stats., Sec. 1978), that:
>
> "*All citizens* of the United States shall have the same right in every State and Territory as is

enjoyed by white citizens thereof to inherit, *purchase, lease, sell, hold, and convey real and personal property.*"

"And in 1870, by Ch. 114, Sec. 16, 16 Stat. 144 (Rev. Stats., Sec. 1977) that:

"*All persons* within the jurisdiction of the United States shall have the same right in every State and Territory *to make and enforce contracts,* to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and no other." (*Buchanan* vs. *Warley,* 245 U. S. 60 at 78 (Italics those of this court.)

"These statutes show that Congress then understood the Fourteenth Amendment did not forbid the state the right to deny ownership of lands within its boundaries to aliens."

(This section, 1977 R. S., is claimed to support appellees in the case at bar, which claim we shall later discuss.)

1. ALIEN LAND LEGISLATION IN OTHER STATES AND COUNTRIES.

Six other states have adopted legislation similar to the California law. They are Louisiana, Arizona, Delaware, Washington, New Mexico and Texas. Six states have taken preliminary steps looking to such legislation. They are Colorado, Nevada, Nebraska, Oregon, Idaho and Montana.

The Philippine legislature has passed an act, with the sanction of the Federal government of the United States, limiting ownership and leasing of land to citizens of the Philippine Islands or the United States, except that citizens of countries whose laws grant to the citizens of the Philippines the right to acquire land may acquire in the Philippines a parcel of agricultural land not in excess of one hundred hectares.

In Mexico only Mexicans by birth or naturalization and Mexican companies have the right to ownership in land. The nation may grant the same right to foreigners, provided they agree before the Department of Foreign Affairs to be considered Mexicans in respect to such property and accordingly not to invoke the protection of their government in respect to the same.

In Australia the matter of land ownership is one affecting the individual state government. In the states of New South Wales, South Australia and Tasmania restrictions are imposed upon the tenure of lands by aliens. In New South Wales an alien is not qualified to apply for original homestead selection, original conditional purchase lease, settlement lease, original homestead lease or original conditional purchase unless he has resided in New South Wales for one year and, at the time of making application, lodges a declaration of his intention to become naturalized within five years. If he fails to become naturalized within that period the land is forfeited.

In South Australia Asiatics are disqualified from holding perpetual leases of land in irrigation areas. In Tasmania aliens can not own real estate.

II.

SECTIONS 1977 AND 2164 UNITED STATES REVISED STATUTES ARE NOT VIOLATED BY THE CALIFORNIA ALIEN LAND LAW.

Section 1977 of the Revised Statutes provides that:

> "All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

Section 2164 of the Revised Statutes provides that:

> "No tax or charge shall be imposed or enforced by any state upon any person immigrating thereto from a foreign country, which is not equally imposed upon any person entering such state from any other foreign country."

Paragraph VIII of the bill of complaint (Tr. fol. 9) alleges that the act denies to the plaintiffs equal protection of the laws.

Paragraph IX (Tr. fol. 9) invokes the sanctity of section 1977 of the United States Revised Statutes, which, as pointed out in the opinion in *Terrace* vs.

Thompson, simply declares the right of all persons "*to make and enforce* contracts."

Obviously this section is limited in its scope to what it describes "Contracts." Though a lease may have contractual features, it is really in law a conveyance of a qualified interest in land.

See

Buchanan vs. *Warley,* 245 U. S. 60, 78.

While a lease is a form of contract, its effect is to convey a right to possession of real estate and to the profits thereof. It may take the form of "conveyance to a person for life, years, or at will, in consideration of a return of rent or other recompense."

18 Am. & Eng. Ency. of Law, 2d Ed., 597, citing
Branch vs. *Doane,* 17 Conn. 402;
Bonsall vs. *McKay,* 1 Houst. (Del.) 520;
Jackson vs. *Harsen,* 7 Cow. (N. Y.) 326; 17 Am. Dec. 517.

Section 2164 of the United States Revised Statutes, also invoked by the bill of complaint in paragraph X thereof (Tr. fol. 4), forbids any state imposing unequal taxes upon persons immigrating from any foreign state. What this section has to do with agricultural land leases we fail to perceive.

Sections 1977 and 2164 partially enumerate the rights and immunities intended to be guaranteed by the Fourteenth Amendment to the Constitution. The object of section 1977 was to place the colored race, in respect to civil rights, on a level with the whites.

In other words, it makes effective in part the Fourteenth Amendment itself, and we need discuss the statutes no further than to refer to our discussion above contained, which is presented as an argument to show that the Fourteenth Amendment is in no way applicable to the privilege claimed on behalf of an alien ineligible to citizenship to lease lands in California for agricultural purposes.

III.

CALIFORNIA ALIEN LAND LAW DOES NOT VIOLATE UNITED STATES-JAPAN TREATY OF COMMERCE AND NAVIGATION OF FEBRUARY 21, 1911.

A. EXAMINATION OF THE TREATY AND STUDY OF THE DIPLOMATIC NEGOTIATIONS PRECEDING ITS APPROVAL SUSTAIN THIS CONCLUSION.

This treaty is found in Volume 3 of Malloy's Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and Other Powers, Supplement 1913, to Senate Document No. 357, Sixty-first Congress, second session, at page 77. It is entitled a treaty of "Commerce and Navigation." The introductory language states that the President of the United States of America and His Majesty the Emperor of Japan, "believing that the fixation in a manner clear and positive of the rules which are hereafter to govern the commercial intercourse between their respective countries will contribute to the realization of this most desirable

result" (that is, a relation of amity and good understanding), "have resolved to conclude a treaty of commerce and navigation for that purpose, etc."

Article I provides: That the citizens or subjects of each of the High Contracting Parties

> "shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes * * *"

Article II provides: That the dwellings, warehouses, manufactories and shops of the citizens or subjects of each of the High Contracting Parties in the territories of the other, and all premises appertaining thereto "used for purposes of residence or commerce, shall be respected."

Article IV refers to the "most favored nation" provision. It is stated that:

> "There shall be between the territories of the two High Contracting Parties reciprocal freedom of commerce and navigation. The citizens or subjects of each of the contracting parties, equally with the citizens or subjects of the most favored nation, shall have liberty freely to come with their ships and cargoes to all places, ports and rivers in the territories of the other which are or may be opened to foreign commerce, subject always to the laws of the country to which they thus come."

An examination of the different articles of this treaty will show throughout that its purpose is to pro-

vide essentially and particularly for commerce and navigation between the two contracting parties. In Article XIII it is provided: That the coasting trade of the High Contracting Parties is excepted from the provisions of the treaty and shall be regulated according to the laws of the United States and Japan, respectively. The article continues, however, to state that

> "it is, however, understood that the citizens or subjects of either contracting party shall enjoy in this respect most-favored-nation treatment in the territories of the other."

Here, again, is an express reference to the most favored nation rule applying particularly to commerce and navigation.

This most favored nation proviso is again contained in Article XIV, where it is provided that

> "*except as otherwise expressly provided in this treaty,* the High Contracting Parties agree that, *in all that concerns commerce and navigation,* any privilege, favor or immunity which either contracting party has actually granted, or may hereafter grant, to the citizens or subjects of any other state shall be extended to the citizens or subjects of the other contracting party gratuitously, if the concession in favor of that other state shall have been gratuitous, and on the same or equivalent conditions, if the concession shall have been conditional."

The above italicized language indicates not only that the most favored nation provision has nothing to

do with the holding by leasehold or otherwise of land in the respective countries, but also that the treaty is essentially one of commerce and navigation.

In the *Terrace* case the court refers to the controversy which arose concerning the validity, under the treaty, of the earlier California Alien Land Law passed in 1913. (Statutes of California, 1913, page 206.) The court states that in the progress of the exchange of views between the Department of Foreign Affairs for the Empire of Japan and the Secretary of State of the United States, the Secretary of State found that the California act did not violate the treaty. The court refers to a communication addressed by the Secretary of State, dated July 16, 1913, to the Japanese Ambassador. This communication is described by the court as "Annex No. 7, pages 17 and 18," Controversy—United States and Japan—California Question (Congressional Library J. V. 6888 C. 2 J. 4). This letter is also to be found in "Papers Relating to Foreign Relations of the United States" —1913, at pages 643 and 644.

The court's quotation from the letter of Secretary Bryan is as follows: (Pages 844–45: italics and capitalization are the court's.)

> "This treaty was based upon a draft presented by the Imperial Government. In Article I of this draft there is found the following clause:
>
> " '3. They (the citizens or subjects of the contracting parties) shall be permitted to own or hire and occupy the houses, manufactories, warehouses, shops and premises which may be neces-

sary for them, and to lease land for RESIDENTIAL, COMMERCIAL, INDUSTRIAL, MANUFACTURING and other lawful purposes.'

"It will be observed that in this clause, which was intended to deal with the subject of real property, there is no reference to the ownership of land. The reason of this omission is understood to be that the Imperial Government desired to avoid treaty engagements concerning the ownership of land by foreigners and to regulate the matter wholly by domestic legislation.

"In the treaty as signed the rights of the citizens and subjects of the contracting parties with reference to real property were specifically dealt with (Art. I) in the stipulation that they should have liberty 'to own or lease and occupy houses, manufactories, warehouses and shops' and 'to lease land for residential and commercial purposes.' IT THUS APPEARS THAT THE RECIPROCAL RIGHT TO LEASE LAND WAS CONFINED TO 'RESIDENTIAL AND COMMERCIAL PURPOSES,' AND THAT THE PHRASES 'INDUSTRIAL' AND 'OTHER LAWFUL PURPOSES,' *which would have included the leasing of AGRICULTURAL LANDS, WERE OMITTED.*

"The question of the ownership of land was, in pursuance of the desire of the Japanese Government, dealt with by an exchange of notes in which it was acknowledged and agreed that this question should be regulated in each country by the local law and that the law applicable in the United States in this regard was that of the respective states. This clearly appears from the note of

Baron Uchida to Mr. Knox of February 21, 1911, in which, in reply to an inquiry of the latter on the subject, Baron Uchida said:

"'In return for the rights of land ownership which are granted Japanese by the laws of the various states of the United States (of which, I may observe, there are now about thirty) the Imperial Government will by liberal interpretation of the law be prepared to grant land ownership to *American citizens from all the states, reserving for the future, however, the right of maintaining the condition of reciprocity with respect to the separate states.*'

"In quoting the foregoing passage I have italicized the last clause for the purpose of calling special attention to the fact that the contracting parties distinctly understood that, in conformity with the express declaration of the Imperial Japanese Ambassador, the right was reserved to maintain as to land ownership the condition of reciprocity in the sense that citizens of the United States, coming from states in which Japanese might not be permitted to own land, were to be excluded from the reciprocal privilege in Japan.

"From what has been pointed out it appears to result first, that the California statute, in extending to aliens not eligible to citizenship of the United States the right to lease lands in that state for agricultural purposes for a term not exceeding three years, may be held *to go beyond the measure of privilege established in the treaty, which does not grant the right to lease* AGRICULTURAL LANDS AT ALL; and, secondly, that, so far as the statute may abridge the right of such aliens

to own lands within the states, the right has been reserved by the Imperial Government to act upon the principle of exact reciprocity with respect to citizens of the individual states. In a word, the measure of privilege and the measure of satisfaction for its denial were perfectly understood and accepted."

In a communication from the Japanese Minister for Foreign Affairs to the Japanese Ambassador at Washington, in the matter of this diplomatic correspondence, the minister referred as follows to the remarks of Mr. Bryan above quoted: (Papers Relating to the Foreign Relations of the United States, 1913, Department of State, United States of America, at pages 652-653.)

"It is unnecessary, it seems to me, to follow Mr. Bryan in his remarks concerning the negotiations connected with the conclusion of the treaty of 1911. It is sufficient to say that the reason, why no stipulation regarding land ownership was inserted in the treaty, is because neither contracting party desired at that time such a stipulation, the United States equally with Japan."

Here is an admission by the Japanese Minister that neither of the contracting parties desired any stipulation regarding land ownership.

With reference to any claim that the California Alien Land Law of 1913 discriminated against Japanese subjects as such "in the matter of ownership of lands and houses," the "Aide-Mémoire" attached to Secretary of State Bryan's letter No. 7 in the

"Resume of the Controversy between Japan and the United States," and found at page 645 in the "Papers Relating to the Foreign Relations of the United States, 1913," states that

> "it may be repeated that the statute contains no discrimination against Japanese as such, but applies equally to all aliens not eligible to citizenship."

Additional references to the said "Resume of the Controversy between Japan and the United States" arising out of the California question might here be called to this court's attention. (Congressional Library J. V. 6888 C. 2 J. 4.) There is a note written in ink on the fly leaf of this document, on a memorandum paper of the "Department of State, Bureau of Rolls and Library," as follows: "This is said to be an official Japanese publication printed at Tokyo." At page 2 of the document this statement appears:

> "It is true that under the law, Japanese are granted the right to lease agricultural lands for a short term—a right which is not expressly secured by the treaty—etc."

Here is a concession that the treaty does not cover agricultural leases. Also at page 8 of the document there is a description of an audience had between the President of the United States and the Japanese Ambassador. The Japanese Ambassador read a

memorandum referring to the California Land Law and the treaty, and in reply the President stated:

> "That if on further study, the law should be found to be in conflict with treaty provisions, the administration would be prepared to seek a judicial remedy, and that, even in case a suit should not be instituted, means would be sought to compensate Japanese for any loss which they might have actually sustained."

This statement clearly illustrates an executive construction of the treaty, since the Government of the United States has never made any effort to seek a judicial remedy on behalf of the Japanese affected by the California Alien Land Law, nor has it attempted to compensate them.

The first letter in the correspondence set forth in this "Resume" and labeled "Number 2" is a letter from the Japanese Ambassador to Secretary of State Bryan, under date of May 9, 1913. While in this letter the Ambassador does protest against the California Alien Land Law upon grounds not here in question, it is to be noted that he does not raise the point that agricultural leases are included within the treaty. This letter is also to be found at page 629 of the "Papers Relating to the Foreign Relations of the United States—1913." Number 6 of the document is an "Aide-Mémoire, in Explanation and Support of Viscount Chinda's Note of June 4, 1913." It is dated July 3, 1913. This Aide-Mémoire is also to be found at page 635 of the "Papers Relating to the Foreign Relations of the United States, 1913."

It appears from the letter No. 7, *supra,* of Secretary of State Bryan that the treaty, as originally drafted by the Imperial Japanese Government, provided expressly for leases for "industrial, manufacturing and other lawful purposes," but that this clause was omitted in the treaty as finally agreed upon, leaving the language as we now have it—"to lease land for residential and commercial purposes."

The court, at page 845 of the *Terrace* case, then follows this quotation from Secretary Bryan's letter with the citation of the case of *Sullivan* vs. *Kidd,* decided January 23, 1921, 254 U. S. 433, and quotes therefrom as follows:

> "While the question of the construction of treaties is judicial in its nature, and the courts when called upon to act should be careful to see that international engagements are faithfully kept and observed, the construction placed upon the treaty before us and consistently adhered to by the Executive Department of the government, charged with the supervision of our foreign relations, should be given much weight."

The court, in the *Terrace* case, then continues in the following convincing language to show that by merely withholding in the treaty the right to lease real estate, the states were granted the right to determine this question for themselves, while Congress, had it wanted to, might have absolutely prohibited to aliens this right to lease (page 846):

> "Aliens may only come to the United States upon such conditions and terms as our govern-

ment sees fit to impose. By the treaty, the rights to lease real estate in the United States for agricultural purposes is withheld (*Hauenstein* vs. *Lynham,* 100 U. S. 483). It might have been, by Congressional enactment, prohibited (*U. S.* vs. *Repentigney,* 72 U. S. 211); but, by the treaty, it was neither granted nor prohibited. It was merely withheld, which left the State free to prohibit. The United States might have excluded all of the subjects of Japan; but rather chose to admit them, withholding the right to lease agricultural lands, thereby recognizing the right of the State to prohibit it, or regulate it. That purpose is not to be defeated by allowing the citizen land owner the broad construction of his rights under the Fourteenth Amendment for which contention is made."

The treaty with Japan expressly and positively limits in Article I thereof the interests that any of the citizens of either country may have in lands "to lease land for residential and commercial purposes."

By elementary rules of construction of such public documents as treaties between nations there can be no claim to any greater interest in realty under the treaty than to so "lease land for residential and commercial purposes."

It should be borne particularly in mind that the problem of California, as well as of other western states of the Union at the time of the negotiation of this treaty, was an agricultural problem, and we may assume, therefore, that the expression "to lease land

for residential and commercial purposes" was used advisedly.

The history subsequent to the treaty of Alien Land legislation in California sustains this view. In 1913 the legislature of the state adopted an act prohibiting agricultural leases by aliens for a term of more than three years. (Statutes 1913, page 206. See section 2.)

Said section 2 provided that "All aliens other than those mentioned in section one of this act" (that is other than aliens eligible to citizenship) "may acquire, possess, enjoy and transfer real property, or any interest therein, in this state, in the manner and to the extent and for the purposes prescribed by any treaty now existing between the government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise, and may in addition thereto lease lands in this state for agricultural purposes for a term not exceeding three years."

Secretary of State Bryan protested the passage of this law and attended the legislative session in California to urge his objections thereto. (Congressional Record, Sixty-sixth Congress, 3d Ed., Vol. 60, p. 4148.) Neither Secretary of State Bryan nor the representatives of Japan urged, at any time, that the treaty with Japan gave the right to Japanese to lease lands for agricultural purposes.

B. HISTORICAL ANAYLSIS OF THE SEVERAL TREATIES BETWEEN JAPAN AND THE UNITED STATES SHOWS THAT LEASEHOLD INTERESTS HAVE ALWAYS BEEN RESTRICTED TO LANDS DEVOTED SOLELY TO TRADE AND COMMERCE.

1. THE TREATY OF 1854. (I Malloy's Treaties, etc., page 996.) This was a commercial treaty, which for the first time opened the ports of Japan to the ships of the United States. It was negotiated by the celebrated U. S. Commodore Matthew Calbraith Perry, and is his chief title to fame.

It contains no reference whatever to the extraterritorial rights of either party.

2. THE TREATY OF 1857. (I Malloy's Treaties, etc., page 998.) This was a commercial and consular treaty, and does not refer to any extraterritorial rights.

3. THE TREATY OF 1858. (II Malloy's Treaties, etc., page 1000.) This was also a commercial and consular treaty. It opened certain specified ports and settlements to Americans, and closed others. In Article III thereof this appears:

> "In all the foregoing ports and towns American citizens may permanently reside; they shall have the right to lease grounds and purchase the buildings thereon and may erect dwellings and warehouses."

It contained no provisions granting to Japanese citizens any right to reside in America or purchase or lease land there for any purpose. As will be seen

below, this treaty and all others were superseded and repealed by the treaties of 1894 and 1911.

4. TREATY OF 1864. (I Malloy's Treaties, page 1010.) This was called "Convention for the reduction of import duties," and it deals with that subject only.

5. SECOND TREATY OF 1864. (I Malloy's Treaties, page 1011.) This settled the payment of the so-called "Simoneski Indemnities," and did not cover anything else.

6. TREATY OF 1866. (I Malloy's Treaties, page 1012.) This was a treaty between Japan, the United States, Great Britain, France and the Netherlands, and was designed to establish certain tariff duties between these nations. There was nothing in it concerning territorial rights.

7. TREATY OF 1878. (I Malloy's Treaties, page 1021.)

This was called a "Commercial Convention." It related to tariff and export duties. It opened two additional ports which it declared should "be open to citizens and vessels of the United States for the purpose of residences and trade."

8. TREATY OF 1880. (I Malloy's Treaties, page 1024.) This covered the reimbursement of expenses incurred by either country in consequence of the shipwreck, on the coast, of the vessels of the other country.

9. TREATY OF 1886. (I Malloy's Treaties, page 1025.) This was an extradition treaty only.

10. TREATY OF 1894. (I Malloy's Treaties, page 1028, *et seq.*) This was a broad and comprehensive treaty relating to commerce and navigation. For the first time it touched the subject of extraterritorial rights. It remained in force until the adoption of the Treaty of 1911 under consideration in the case at bar.

Article I of this treaty reads as follows:

"ARTICLE I.

"The citizens or subjects of each of the two High Contracting Parties shall have full liberty to enter, travel, or reside in any part of the territories of the other contracting party, and shall enjoy full and perfect protection for their persons and property.

"They shall have free access to the courts of justice in pursuit and defense of their rights; they shall be at liberty equally with native citizens or subjects to choose and employ lawyers, advocates and representatives to pursue and defend their rights before such courts, and in all other matters connected with the administration of justice they shall enjoy all the rights and privileges enjoyed by native citizens or subjects.

"In whatever relates to rights of residence and travel; to the possession of goods and effects of any kind; to the succession to personal estate, by will or otherwise, and the disposal of property of any sort and in any manner whatsoever which they may lawfully acquire, the citizens or subjects of each contracting party shall enjoy in the territories of the other the same privileges, liberties,

and rights, and shall be subject to no higher imposts or charges in these respects than native citizens or subjects of the most favored nation. The citizens or subjects of each of the contracting parties shall enjoy in the territories of the other entire liberty of conscience, and, subject to the laws, ordinances and regulations, shall enjoy the right of private or public exercise of their worship, and also the right of burying their respective countrymen, according to their religious customs, in such suitable and convenient places as may be established and maintained for that purpose.

"They shall not be compelled, under any pretext whatsoever, to pay any charges or taxes other or higher than those that are, or may be paid by native citizens or subjects, or citizens or subjects of the most favored nation.

"The citizens or subjects of either of the contracting parties residing in the territories of the other shall be exempt from all compulsory military service whatsoever, whether in the army, navy, national guard, or militia; from all contributions imposed in lieu of personal service; and from all forced loans or military exactions or contributions."

Article II provided:

"ARTICLE II.

"There shall be reciprocal freedom of commerce and navigation between the territories of the two High Contracting Parties.

"The citizens or subjects of each of the High Contracting Parties may trade in any part of the

territories of the other by wholesale or retail in all kinds of produce, manufactures, and merchandise of lawful commerce, either in person or by agents, singly or in partnership with foreigners or native citizens or subjects; and they may there own or hire and occupy houses, manufactories, warehouses, shops and premises which may be necessary for them, and lease land for residential and commercial purposes, conforming themselves to the laws, police and customs regulations of the country like native citizens or subjects.

"They shall have liberty freely to come with their ships and cargoes to all places, ports, and rivers in the territories of the other, which are or may be opened to foreign commerce, and shall enjoy, respectively, the same treatment in matters of commerce and navigation as native citizens or subjects, or citizens or subjects of the most favored nation, without having to pay taxes, imposts or duties, of whatever nature or under whatever denomination levied in the name or for the profit of the Government, public functionaries, private individuals, corporations, or establishments of any kind, other or greater than those paid by native citizens or subjects, or citizens or subjects of the most favored nation.

"It is, however, understood that the stipulation contained in this and the preceding article do not in any way affect the laws, ordinances and regulations with regard to trade, immigration of laborers, police and public security which are in force or which may hereafter be enacted in either of the two countries."

It will be noted that this Article II of the 1894 treaty corresponds to Article I of the 1911 treaty so far as certain privileges of commerce are concerned, and in particular so far as the rights to own or lease and occupy houses, manufactories, warehouses and shops, and *"to lease land for residential and commercial purposes."*

Article III of this treaty provided:

"ARTICLE III.

"The dwellings, manufactories, warehouses, and shops of the citizens or subjects of each of the High Contracting Parties in the territories of the other, and all premises appertaining thereto destined for purposes of residence or commerce, shall be respected.

"It shall not be allowable to proceed to make a search of, or a domiciliary visit to such dwellings and premises, or to examine or inspect books, papers, or accounts, except under the conditions and with the forms prescribed by the laws, ordinances and regulations for citizens or subjects of the country."

In Article XIV of this treaty is set forth "the most favored nation" clause, which here for the first time appears in any treaty between Japan and the United States. It is as follows:

"The High Contracting Parties agree that, in all that concerns commerce and navigation, any privilege, favor or immunity which either High Contracting Party has actually granted, or may

hereafter grant, to the government, ships, citizens or subjects of any other state, shall be extended to the government, ships, citizens, or subjects of the other High Contracting Party, gratuitously, if the concession in favor of that other state shall have been gratuitous, and on the same or equivalent conditions if the concession shall have been conditional; it being their intention that the trade and navigation of each country shall be placed, in all respects, by the other upon the footing of the most favored nation."

Article XVII contained the significant provision that the several

"foreign settlements in Japan should be incorporated with the respective Japanese Communes, and that when such incorporation takes place, existing leases in perpetuity, upon which property is now held *in such settlements,* shall be confirmed, and no conditions whatsoever other than those contained in such existing leases shall be imposed in respect of such property."

11. THE TREATY OF 1897. (I Malloy's Treaties, page 1037.) This was a convention as to patents, trade-marks and designs.

12. THE TREATY OF 1905. (I Malloy's Treaties, page 1037.) This was a coypright convention.

13. THE TREATY OF 1906. (I Malloy's Treaties, page 1039.) This was a supplementary extradition treaty.

14. THE TREATY OF 1908. (I Malloy's Treaties, page 1040.) This was a treaty by which the parties agreed to submit to the arbitration of the permanent

Court of Arbitration at The Hague "differences which may arise of a legal nature or relating to the interpretation of treaties between the two contracting parties."

15. SECOND TREATY OF 1908. (I Malloy's Treaties, page 1041.) This relates to protection of trademarks in Korea.

16. THIRD TREATY OF 1908. (I Malloy's Treaties, page 1043.) This related to the protection of trademarks in China.

Thus it will seen from this chronological review of the various treaties between the two powers, beginning with the celebrated Commodore Perry Treaty of 1854, that when these powers negotiated the treaty of 1911 they were aware that all their previous conventions had related, almost without exception, solely to matters connected with trade and commerce; and that any extraterritorial claims or rights of the Japanese were hardly considered at all.

As to personal property their rights were limited "to the succession of personal property by will or otherwise"; and as to acquiring and holding real property their rights were so limited that at the places where they should trade and carry on commerce either alone or with foreigners or native citizens they might

> "*there* own or hire or occupy *houses, manufactories, warehouses, shops* and *premises* which may be necessary for them, and *lease land for residential and commercial purposes.*" (Treaty of 1894.)

Thus we see a clear distinction was made by this treaty as to owning, hiring or occupying erections upon the land for trade purposes; but when it came to the question of leasing land this right was strictly and definitely limited to leasing land for *residential* and *commercial* purposes.

Clearly then this treaty as to extraterritorial rights in land covered only those persons who were engaged in trade and commerce at wholesale and retail, and the only lands they could own or hire were lands necessary for them for those purposes and located "there" (Art. II); *i. e.,* where they carried on such strictly trade operations. They might lease land for residences and for commercial purposes connected with their trading operations; but if the language employed in any solemn agreement between parties or nations was ever designed or used to limit the rights of the parties to it in respect of leasing lands so that it would exclude agricultural lands such is the language employed in this treaty—"*Expressio unios exclusio alterius est.*"

This treaty apparently opened the whole of the Japanese Empire to our traders who had before that been confined in their business enterprises and residences to certain specified ports and settlements. It was never intended, and no one has ever claimed that it was intended, to permit the subjects of either of the high contracting powers to own or to lease any lands or premises for any other purposes.

Japan would never have conceded any greater rights to our citizens. In view of the opposition and

apprehensions of our countrymen to settlements here of excessive numbers of the Mongolian or Malay race, American statesmen would never have conceded any other or further rights or privileges than trading or commercial rights and privileges to Japanese. This is the more apparent when we note that even in the "most favored nation" clause of the 1894 treaty, (Art. XIV), all rights awarded to either party are especially restricted to those that "concern commerce and navigation."

So also the provision concerning the confirmation to Americans in Japan of their leases in perpetuity covered only property then held in the settlements which were to be incorporated with the Communes, and affected only residence, business and commercial properties, leases to Americans for which were the only properties which Americans had or could have had under the preceding treaties, in Japanese ports and settlements.

Furthermore, it was indeed then well known to both parties that there had been and was most serious objection on the part of the people of the Pacific Coast states, if not elsewhere, to any further extension of any rights or privileges to the citizens of Japan.

Fresh indeed in their minds must have been the trying incident concerning the ordinance of the city of San Francisco, providing for separate schools for Japanese children in that city, which had created nation-wide excitement and discussion, in which the chief executive of the nation had taken part. The

diplomatic representatives of both powers interested knew all of these conditions and must have been moved to draft the treaty of 1911 in such manner that it would not grant any other or more extensive extraterritorial rights as to land holding or land leasing to the subjects of either power.

This was no time for "weasel words, nor for machiavelian tergiversations." If either party desired or intended to permit the subjects of the other power to acquire or hold any land for agricultural purposes or any except the small parcels necessary for residences, shops and warehouses, such party would have caused clear and certain provisions to that effect to be incorporated in the new treaty.

Furthermore, as seen below in this brief, under Japanese laws foreigners could not then and can not now acquire leases of agricultural lands as such. They could acquire leases of land for residential and commercial purposes which may be valuable, and also what are termed "superficies" or occupancy rights of houses and surface rights, but these must always be for residence, or shops, warehouses, stores, etc.

The Civil Code of California sets forth two rules for the interpretation and construction of contracts, which admirably and clearly declare the accepted canons on that subject:

> "SEC. 1647: A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates."

"SEC. 1648: However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract."

Applying the canons of construction to the circumstances and conditions which confronted the high contracting parties at the time they entered into the treaty of 1911; reviewing the history of their conventions and their own interpretation by their own acts at these conventions, is it not clearly manifest that when they negotiated and finally executed the treaty of 1911 neither of them could have intended, as neither of them desired, to grant to the subjects of the other country any absolute right to acquire leasehold interests in any lands but those devoted principally, if not exclusively, to wholesale and retail trading and merchandising?

It becomes entirely certain that they could not have intended to impose upon their subordinate states or provinces, or permit as nations, the creation of an obligation to permit leases of tracts or parcels of any kind of land of any considerable size, much less so of any agricultural lands. Both must have recognized with abiding conviction the enormous difficulties and dangers to their political autonomy which might ensue from any such arrangement.

Hence while each willingly extended the right hand of welcome to those subjects of the other who desired to engage in commercial and manufacturing pursuits, each withheld it from those who might de-

sire and attempt to take away from their own citizens the enjoyment of the agricultural lands of their country.

This conviction must have been the more compelling and, indeed, the history herein recorded of the various treaties shows that it was so compelling, in Japan, because that country had a comparatively small area of land fitted for and devoted to agriculture—far from enough land even with all the intense and intensive cultivation practiced there to support its teeming population.

It is a fact sufficiently well known to warrant this court in taking judicial notice of it, that but for her extended coastline and her productive fisheries, Japan would not be able to feed one-half of her large population.

See International Encyclopedia, Article on Japan, page 573.

On every theory or consideration from which we survey the question before the court, it becomes more certain that it was for the best interest of both these nations, that their subjects should not be granted any rights to acquire leases of agricultural lands in the other country, but it was to their interest that their subjects should be enabled to enter into commercial ventures in each country, and should have in connection therewith land for their residences, shops, stores, warehouses and factories.

All of these rights of the last mentioned character and extent Japan had granted to American subjects

in certain limited areas known as ports and settlements, ever since the shotted guns of Commodore Perry's war fleet forced open the gates of the ports of Nippon to the commerce, the ships and the traders of the occidental world. Any more extensive rights to land holding, she had sedulously and continuously withheld from the subjects of every nation of that world. The treaty of 1911 but crystallized and enforced this policy, by the use of limiting words which restricted leases of lands to leases for *"residential"* and *"commercial"* purposes.

C. FOREIGNERS HAVE NO RIGHT TO OWN OR LEASE LANDS FOR AGRICULTURAL PURPOSES UNDER THE LAW OF JAPAN.

The "Commentary on the Commercial Code of Japan" was written by J. E. DeBecker, "Solicitor and Legal Translator and Advocat-Conseil of the Swiss Legation in Tokyo." He is also the author of the "Annotated Civil Code of Japan." This last work includes an introduction by Count Hayashi, late Japanese Minister for Foreign Affairs and formerly Ambassador Extraordinary and Plenipotentiary for Japan in London.

The "Commentary on the Commercial Code of Japan," in volume 1 at page vii thereof, contains a summary of the "Disabilities of Foreigners Resident in Japan."

This summary reads in part as follows:

"(A) Foreigners can not own land as individuals, but can become superficiary holders for

exceedingly long periods. While a superficies is by no means equal to ownership, if care be taken in drawing and recording it is a fairly valuable class of holding; but it has weak and inconvenient points which are gradually being discovered and is still somewhat of an unknown quantity. A company formed under the Japanese law by foreigners can own land, but not perpetual leases of lands in the former settlements;

A measure has been introduced and passed by the Diet having for its object the granting of ownership of land to aliens; but, to be perfectly candid, it is a half-hearted piece of legislation, and even if it is put in force it will never satisfy the requirements of foreign legal experts, because (from a lawyer's point of view) its provisions are highly unsatisfactory—not to say delusive and perhaps dangerous. Before the law can be accepted by foreign investors it will certainly have to be radically revised and its weak points remedied."

(NOTE.—The writers of this brief understand that even this act has not yet been promulgated by the Emperor of Japan.)

"(B) Foreigners can not become owners of ships flying the Japanese national flag. * * *

(C) Foreigners can not at present become shareholders in Japanese national banks, the 'Bank of Japan,' the 'Yokohama Specie Bank,' or the 'Agricultural and Industrial Bank.' * * *

(D) Foreigners can not as individuals engage in mining, * * *

(E) Foreigners can not become members, shareholders or brokers of the various exchanges; * * *

(F) Foreigners can not engage in the emigration business either as individuals or as shareholders in emigration companies;"

At page 5 of Volume 1 of the Civil Code, "foreigners" are described as "persons who do not possess Japanese nationality. Such persons are foreigners by nationality even though they may belong to the Japanese race. Persons who possess no nationality are also considered as foreigners."

An explanation follows after a general statement of the adoption by the Japanese law of the principle of international equality in accordance with the modern tendency. This explanation is as follows:

"But, as in most other countries, it is considered, either rightly or wrongly, that if foreigners were permitted to absolutely enjoy the same private rights as natives the safety and peace of the state or other public interests might be endangered, so it is therefore provided in effect that 'foreigners can not enjoy those private rights forbidden to them by laws and ordinances.' The more important private rights which can not be enjoyed by foreigners are the following:

(1) Foreigners can not enjoy the ownership of land, and they do not enjoy the franchise even in purely local matters."

Here we find DeBecker, in the Civil Code of Japan, enunciating the rule which we have found to be fundamental to a correct conclusion on this entire subject matter. That is, the rule of self-preservation which all nations have at all times insisted upon

and which rule leads to the inevitable right of each nation to have absolute control so far as the dominion, enjoyment and possession of its lands are concerned.

(And then follow, in the Civil Code, the other classifications, generally, as above.)

At page viii of Volume I of the "Commercial Code," DeBecker says.

> "It must be remembered that the Japanese courts are apt to construe laws somewhat narrowly and strictly, and that therefore it is unsafe to depend upon receiving the benefit of any liberal interpretation which would extend rather than narrow the rights of litigants. There are no 'equity courts' in Japan, and the ordinary judges adjudicate strictly and absolutely upon the transactions themselves *in rem* and not *in personam*. 'Judicial legislation' is, at present, forbidden, and the result is a distinct tendency to foster a system of authority and rigid routine, based on technical considerations, rather than a flexible one dictated by the requirements of natural justice and practical public needs."

With reference to the above statement in the "Commentary on the Commercial Code," that foreigners "can become superficiary holders for exceedingly long periods," these "superficies" are more particularly described in DeBecker's "Civil Code of Japan." In Volume 1, page 238, of the "Civil Code," the author states that "Superficies is a real right in virtue of which land belonging to another

person can be used *for the purpose of owning thereon structures, trees and bamboos.*" At page 239, Article 265 reads:

> "A superficiary has the right of using the land of another person for the purpose of owning thereon structures or trees and bamboos."

The author continues with this explanation:

> "This article defines the nature of superficies. Superficies is the right of using the land of another person for the purpose of constructing structures, buildings or artificial mounds or digging ponds and wells, or owning trees and bamboos thereon. Therefore even though such works or trees and bamboos may have no actual existence, this right can be created all the same provided that the object and intention is to use the land for such purpose."

Article 269, at page 242, states that:

> "The superficiary can, when his right is extinguished, take away his structures or trees and bamboos on restoring the land to its original state; but when the owner of the land gives notice that he desires to purchase them and offers to pay their current value, the superficiary can not refuse such offer without adequate reason."

This does not include the right to possess land for agricultural purposes.

IV.

PLAINTIFF MIZUNO IS NOT "CARRYING ON TRADE, WHOLESALE AND RETAIL," OR LEASING LAND FOR "COMMERCIAL PURPOSES" WITHIN THE SCOPE OF THE TREATY OF COMMERCE AND NAVIGATION WITH JAPAN.

As noted above in the "Statement of the Case," paragraph V of the complaint in this action states that the plaintiff Mizuno, in addition to being a farmer, "is engaged in the business of trading, wholesale and retail, in farm products."

This allegation is included so as to claim the protection of the treaty provisions which give to the nationals of the two contracting parties liberty to carry on trade, wholesale and retail, in the territories of the other.

It might be well at this point to quote this statement found in paragraph V of the complaint, and to indicate that it is identical in its language with a similar allegation found in the bill of complaint in the *Terrace* case. The allegation of paragraph V of the bill of complaint in our case is couched in the following language, and this language, with the exception of the names of the parties, is identical with the similar allegation in the *Terrace* case with the exception of that portion which we shall place in parentheses, which is found in the *Terrace* case and not in this case, and which, if there be any distinction

at all, renders the pleading in this case weaker than that found in the *Terrace* case:

> "That said plaintiff Mizuno, in addition to being a capable farmer, is engaged in the business of trading, wholesale and retail, in farm products, and instead of purchasing such farm products, he (had produced and) desires to produce his own farm products for the purpose of selling them in the wholesale and retail trade, and if he is prevented from leasing land for the purpose of producing such farm products for such trade, he will be prevented from engaging in trade and the incidents to trade as he is authorized so to do under the treaty hereinafter mentioned."

In the *Terrace* case the District Court addressed itself to the claim that the complainant Nakatsuka's business of farming was incidental to his business as a wholesale and retail trader in farm products and used the following language with reference to this argument (pp. 845–46):

> "A clear intention being shown not to supersede" (in the treaty), "in the particular now in question, the state's authority to regulate the rights of title and possession in lands within its boundaries, that intent may not be defeated by the claim now made that complainant Nakatsuka's business of farming is incidental to his business as a wholesale and retail trader in farm products, for there is no more reason for considering farming an incident of the latter than for considering the latter an incident of the former. The language of the treaty is: 'and generally to do anything incident to or necessary for trade upon the

same terms as native citizens or subjects * * *.' (37 Stat. at L. 1504.)

"In the most liberal construction of this language that may be indulged in, it can not fairly be said that truck farming is incidental to trading, either wholesale or retail, in the products of a farm, any more than conducting a sheep ranch or growing mulberry trees is incidental to the dry goods trade.

Kidd vs. *Pearson,* 128 U. S. 1;
U. S. vs. *E. C. Knight Co.,* 156 U. S. 1;
Joyce vs. *Auten,* 179 U. S. 591, at 594;
Capital City Dairy Co. vs. *Ohio,* 185 U. S. 238, 245."

None of the allegations contained in paragraph V include the allegation that Mizuno intends to use the agricultural land described in paragraph IV for any purpose except for agricultural purposes; and after all is said, it is clearly shown that the land is agricultural land and is not sought to be leased for residential or commercial purposes. The bill does not attempt to allege even by inference that Mizuno intends to erect a warehouse or a store on the land or to continue his business of selling his products on said land. Hence, the allegations of paragraph V do not in any way change or qualify the allegation of paragraph IV, from which it clearly appears that the lease in question is solely for agricultural purposes and is not for "residential" or "commercial" purposes, which is the only kind of lease mentioned in and permitted by the terms of the Japanese treaty.

In the case of *Kidd* vs. *Pearson,* 128 U. S. 1, the court held that a state could prohibit the manufacture of intoxicating liquors even though such liquors were intended thereafter to be transported in interstate commerce. It was urged in the case that since Congress had power to regulate commerce the state therefore could not interfere with the manufacture of articles which were used in that commerce. The court denied the contention in the following language:

> "No distinction is more popular to the common mind or more clearly expressed in economic and political literature, than that between manufactures and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation. The legal definition of the term as given by this court in *County of Mobile* vs. *Kimball,* 102 U. S. 691, 702, is as follows: 'Commerce with foreign nations and among the states, strictly considered, consists in intercourse and traffic, including in these terms, navigation and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities.' If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is

impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the states, with the power to regulate, not only manufacture, *but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry.* For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? *Does not the wheat grower of the Northwest, and the cotton planter of the South, plant, cultivate and harvest his crop with an eye on the prices at Liverpool, New York and Chicago?* The power being vested in Congress and denied to the states, it would follow as an inevitable result that the duty would devolve on Congress to regulate all of these delicate, multiform, and vital interests—interests which in their nature are, and must be, local in all the details of their successful management."

In *United States* vs. *Knight,* 156 U. S. 1, the court, upon the authority of the *Kidd* case, *supra,* held that the Sherman Anti-Trust Act did not apply to a combination formed by a number of sugar refining companies to restrain competition, for the reason that the court said the manufacture of sugar was not a part of that commerce. The court in that case observed, at page 12:

"Doubtless the power to control the manufacture of a given thing involves, in a certain sense, the control of its disposition, but this is a secondary not the primary sense; and although the exercise of that power may result in bringing

the operation of commerce into play, does not control it, and affects it only incidentally and indirectly. Commerce succeeds to manufacture, and is not a part of it."

This doctrine is adhered to in the subsequent cases of *Hopkins* vs. *United States,* 179 U. S. 394; *Capital City Co.* vs. *Ohio,* 183 U. S. 245.

Just as the manufacture of sugar and of intoxicating liquors to be thereafter transported in interstate commerce is not a part of such commerce within the provision of the commerce clause of the United States Constitution, so by the same reasoning the pursuit of a farmer in raising agricultural products is not the pursuit of commerce within the terms of our treaty with Japan.

Respectfully submitted.

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APPENDIX.

Exhibit A.

CALIFORNIA ALIEN LAND LAW OF 1920.

(Statutes of California, 1921, page lxxxiii.)

An act relating to the rights, powers and disabilities of aliens and of certain companies, associations and corporations with respect to property in this state, providing for escheats in certain cases, prescribing the procedure therein, requiring reports of certain property holdings to facilitate the enforcement of this act, prescribing penalties for violation of the provisions hereof, and repealing all acts or parts of acts inconsistent or in conflict herewith.

The people of the State of California do enact as follows:

Section 1. All aliens eligible to citizenship under the laws of the United States may acquire, possess, enjoy, transmit and inherit real property, or any interest therein, in this state, in the same manner and to the same extent as citizens of the United States, except as otherwise provided by the laws of this state.

Sec. 2. All aliens other than those mentioned in section one of this act may acquire, possess, enjoy and transfer real property, or any interest therein, in this state, in the manner and to the extent, and for the purpose prescribed by any treaty now existing between the government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise.

Sec. 3. Any company, association or corporation organized under the laws of this or any other state or nation, of which a majority of the members are aliens other than those specified in section one of this act, or in which a majority of the issued capital stock is owned by such aliens, may acquire, possess, enjoy and convey real property, or any interest therein, in this state, in the manner and to the extent and for the purposes prescribed by any treaty now existing between the government

of the United States and the nation or country of which such members or stockholders are citizens or subjects, and not otherwise. Hereafter all aliens other than those specified in section one hereof may become members of or acquire shares of stock in any company, association or corporation that is or may be authorized to acquire, possess, enjoy or convey agricultural land, in the manner and to the extent and for the purposes prescribed by any treaty now existing between the government the United States and the nation or country of which such en is a citizen or subject, and not otherwise.

Sec. 4. Hereafter no alien mentioned in section two hereof nd no company, association or corporation mentioned in section three hereof, may be appointed guardian of that portion of the estate of a minor which consists of property which such alien or such company, association or corporation is inhibited from acquiring, possessing, enjoying or transferring by reason of the provisions of this act. The public administrator of the proper county, or any other competent person or corporation, may be appointed guardian of the estate of a minor citizen whose parents are ineligible to appointment under the provisions of this section.

On such notice to the guardian as the court may require, the superior court may remove the guardian of such an estate whenever it appears to the satisfaction of the court:

(a) That the guardian has failed to file the report required by the provisions of section five hereof; or

(b) That the property of the ward has not been or is not being administered with due regard to the primary interest of the ward; or

(c) That facts exist which would make the guardian ineligible to appointment in the first instance; or

(d) That facts establishing any other legal ground for removal exist.

Sec. 5. (a) The term "trustee" as used in this section means any person, company, association or corporation that as guardian, trustee, attorney-in-fact or agent, or in any other capacity has the title, custody or control of property, or some interest therein, belonging to an alien mentioned in section two hereof, or to the minor child of such an alien, if the property is of such a character that such alien is inhibited from acquiring, possessing, enjoying or transferring it.

(b) Annually on or before the thirty-first day of January every such trustee must file in the office of the secretary of state of California and in the office of the county clerk of each county in which any of the property is situated, a verified written report showing:

(1) The property, real or personal, held by him for or on behalf of such alien or minor;

(2) A statement showing the date when each item of such property came into his possession or control;

(3) An itemized account of all expenditures, investments, rents, issues and profits in respect to the administration and control of such property with particular reference to holdings of corporate stock and leases, cropping contracts and other agreements in respect to land and the handling or sale of products thereof.

(c) Any person, company, association or corporation that violates any provision of this section is guilty of a misdemeanor and shall be punished by a fine not exceeding one thousand dollars or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment.

(d) The provisions of this section are cumulative and are not intended to change the jurisdiction or the rules of practice of courts of justice.

Sec. 6. Whenever it appears to the court in any probate proceeding that by reason of the provisions of this act any heir or devisee can not take real property in this state or membership or shares of stock in a company, association or corporation which, but for said provisions, said heir or devisee would take as such, the court, instead of ordering a distribution of such property to such heir or devisee, shall order a sale of said property to be made in the manner provided by law for probate sales of property and the proceeds of such sale shall be distributed to such heir or devisee in lieu of such property.

Sec. 7. Any real property hereafter acquired in fee in violation of the provisions of this act by any alien mentioned in section two of this act, or by any company, association or corporation mentioned in section three of this act, shall escheat to, and become and remain the property of the State of California. The attorney general or district attorney of the proper county shall institute proceedings to have the escheat of such

real property adjudged and enforced in the manner provided by section four hundred seventy-four of the Political Code and title eight, part three of the Code of Civil Procedure. Upon the entry of final judgment in such proceedings, the title to such real property shall pass to the State of California. The provisions of this section and of sections two and three of this act shall not apply to any real property hereafter acquired in the enforcement or in satisfaction of any lien now existing upon, or interest in such property, so long as such real property so acquired shall remain the property of the alien, company, association or corporation acquiring the same in such manner. No alien, company, association or corporation mentioned in section two or section three hereof shall hold for a longer period than two years the possession of any agricultural land acquired in the enforcement of or in satisfaction of a mortgage or other lien hereafter made or acquired in good faith to secure a debt.

Sec. 8. Any leasehold or other interest in real property less than the fee, hereafter acquired in violation of the provisions of this act by any alien mentioned in section two of this act, or by any company, association or corporation mentioned in section three of this act, shall escheat to the State of California. The attorney general or district attorney of the proper county shall institute proceedings to have such escheat adjudged and enforced as provided in section seven of this act. In such proceedings the court shall determine and adjudge the value of such leasehold or other interest in such real property, and enter judgment for the state for the amount thereof together with costs. Thereupon the court shall order a sale of the real property covered by such leasehold, or other interest, in the manner provided by section twelve hundred seventy-one of the Code of Civil Procedure. Out of the proceeds arising from such sale, the amount of the judgment rendered for the state shall be paid into the state treasury and the balance shall be deposited with and distributed by the court in accordance with the interest of the parties therein. Any share of stock or the interest of any member in a company, association or corporation hereafter acquired in violation of the provisions of section three of this act shall escheat to the State of California. Such escheat shall be adjudged and enforced in the same manner as provided in this section for the escheat of a leasehold or other interest in real property less than the fee.

Sec. 9. Every transfer of real property, or of an interest therein, though colorable in form, shall be void as to the state and the interest thereby conveyed or sought to be conveyed shall escheat to the state if the property interest involved is of such a character that an alien mentioned in section two hereof is inhibited from acquiring, possessing, enjoying or transferring it, and if the conveyance is made with intent to prevent, evade or avoid escheat as provided for herein.

A prima facie presumption that the conveyance is made with such intent shall arise upon proof of any of the following groups of facts:

(a) The taking of the property in the name of a person other than the persons mentioned in section two hereof if the consideration is paid or agreed or understood to be paid by an alien mentioned in section two hereof;

(b) The taking of the property in the name of a company, association or corporation, if the memberships or shares of stock therein held by aliens mentioned in section two hereof, together with the memberships or shares of stock held by others but paid for or agreed or understood to be paid for by such aliens, would amount to a majority of the membership or the issued capital stock of such company, association or corporation;

(c) The execution of a mortgage in favor of an alien mentioned in section two hereof if said mortgagee is given possession, control of management of the property.

The enumeration in this section of certain presumptions shall not be so construed as to preclude other presumptions or inferences that reasonably may be made as to the existence of intent to prevent, evade or avoid escheat as provided for herein.

Sec. 10. If two or more persons conspire to effect a transfer of real property, or of an interest therein, in violation of the provisions hereof, they are punishable by imprisonment in the county jail or state penitentiary not exceeding two years, or by a fine not exceeding five thousand dollars, or both.

Sec. 11. Nothing in this act shall be construed as a limitation upon the power of the state to enact laws with respect to the acquisition, holding or disposal by aliens of real property in this state.

Sec. 12. All acts and parts of acts inconsistent or in conflict with the provisions hereof are hereby repealed; provided, that—

(a) This act shall not affect pending actions or proceedings, but the same may be prosecuted and defended with the same effect as if this act had not been adopted;

(b) No cause of action arising under any law of this state shall be affected by reason of the adoption of this act whether an action or proceeding has been instituted thereon at the time of the taking effect of this act or not and actions may be brought upon such causes in the same manner, under the same terms and conditions, and with the same effect as if this act had not been adopted;

(c) This act in so far as it does not add to, take from or alter an existing law, shall be construed as a continuation thereof.

Sec. 13. The legislature may amend this act in furtherance of its purpose and to facilitate its operation.

Sec. 14. If any section, subsection, sentence, clause or phrase of this act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this act. The people hereby declare that they would have passed this act, and each section, subsection, sentence, clause and phrase thereof, irrespective of the fact that any one or more other sections, subsections, sentences, clauses or phrases be declared unconstitutional.

Exhibit B.

WASHINGTON ALIEN LAND LAW OF 1921.

(Chapter 50 of Laws of Washington, 1920, 1921, page 156.)

An act relating to the rights and disabilities of aliens with respect to lands, providing for forfeitures in certain cases, prescribing penalties, and repealing sections 135 and 136 Pierce's Code, 8775 and 8776 of Remington and Ballinger's Annotated Codes and Statutes of Washington.

Be it enacted by the Legislature of the State of Washington:

Section 1. In this act, unless the context otherwise requires,

(a) "Alien" does not include an alien who has in good faith declared his intention to become a citizen of the United States, but does include all other aliens and all corporations and other organized groups of persons a majority of whose capital stock is owned or controlled by aliens or a majority of whose members are aliens;

(b) "Land" does not include lands containing valuable deposits of minerals, metals, iron, coal or fire clay or the necessary land for mills and machinery to be used in the development thereof and the manufacture of the products therefrom, but does include every other kind of land and every interest therein and the right to the control, possession, use, enjoyment, rents, issues or profits thereof except a mortgage and except a right to the possession, use or enjoyment of land for a period of not more than ten years for a purpose for which an alien is accorded the use of land by a treaty between the United States and the country whereof he is a citizen;

(c) "Land" also includes any share or interest in a corporation or other organized group of persons deemed an alien in this act which has title to land either heretofore or hereafter acquired;

(d) To "own" means to have the legal or equitable title to or the right to any benefit of;

(e) "Title" includes every kind of legal or equitable title;

(f) Ownership of or title to land acquired by inheritance or in good faith either under mortgage or in the ordinary

course of justice in the collection of debts, or acquired by a female citizen afterwards expatriated by marriage to an alien, is excluded;

(g) "Inheritance" includes devise;

(h) "Mortgage" includes every kind of lien upon land;

(i) A mortgage of land under which an alien is entitled before default to any control, possession, use or enjoyment of the land, is an absolute conveyance; and

(j) "Person" includes an individual, partnership, corporation or any other organized group of persons.

Sec. 2. An alien shall not own land or take or hold title thereto. No person shall take or hold land or title to land for an alien. Land now held by or for aliens in violation of the constitution of the state is forfeited to and declared to be the property of the state. Land hereafter conveyed to or for the use of aliens in violation of the constitution or of this act shall thereby be forfeited to and become the property of the state.

Sec. 3. An alien is not qualified to be a trustee under a will, executor, administrator or guardian, if any part of the estate is land; Provided, An alien now lawfully acting in any such capacity may continue for not more than two years.

Sec. 4. If hereafter an alien acquire land by inheritance or in good faith either under mortgage or in the ordinary course of justice in the collection of debts and, remaining an alien, hold the same for more than twelve years from the date title was so acquired or control or possession taken, the land shall be forfeited to the state.

Sec. 5. If an alien, claiming or holding under a mortgage, has control, possession, use or enjoyment of the mortgaged land, the obligation secured by the mortgage shall be deemed matured and the mortgage shall be foreclosed; and if the land be not sold under foreclosure within three years after the alien has obtained control, possession, use or enjoyment, the mortgage and the obligation thereby secured shall be forfeited to the state and shall be foreclosed for the use of the state.

Sec. 6. Unless an alien who has declared his intention to become a citizen of the United States be admitted to citizenship within seven years after his declaration was made, it shall be presumed that he declared his intention in bad faith.

Sec. 7. Whoever

(a) Knowingly transfers or conveys land or title to land to an alien; or

(b) Knowingly takes land or title to land in trust for an alien; or

(c) Holding in trust for an alien land or title to land, either heretofore or hereafter acquired, fails for thirty days after acquiring knowledge or notice that he holds in trust for an alien to disclose the fact to the attorney general or the prosecuting attorney of the county where the land is situated; or

(d) Being an alien and having title to land or control, possession, use or enjoyment of land, whether heretofore or hereafter acquired, refuses to disclose to the attorney general or the prosecuting attorney of the county where the land is situated the nature and extent of his interest in and title to the land; or

(e) Being an officer or agent of a corporation or other organized group of persons which has title to land or control, possession, use or enjoyment of land, whether heretofore or hereafter acquired, refuses to disclose to the attorney general or the prosecuting attorney of the county where the land is situated the nature and extent of the interest of persons not citizens of the United States in the corporation or other organized group of persons; or

(f) Being an officer or agent of a corporation or other organized group of persons which holds in trust for an alien title to land or control or possession of land, whether heretofore or hereafter acquired, refuses to disclose to the attorney general or the prosecuting attorney of the county where the land is situated the nature and extent of the alien's interest in and title to the land; or

(g) Wilfully counsels, aids or abets another in violating or evading this act,

Is guilty of a gross misdemeanor.

Sec. 8. It shall be the duty of the attorney general and of the prosecuting attorneys of the several counties to enforce this act, and of the attorney general to direct and control its enforcement.

Sec. 9. Property forfeited to the state by this act shall inure to the permanent common school fund and be managed and disposed of accordingly.

Sec. 10. This act shall not impair any title or right heretofore or hereafter acquired from or derived through an alien in good faith and for value by a person not under an alien's disability.

Sec. 11. If any section or provision of this act shall be adjudged to be invalid or unconstitutional, such adjudication shall not affect the validity of the act as a whole or any section, provision, or part thereof not adjudged invalid or unconstitutional.

Sec. 12. Sections 135 and 136 Pierce's Code, 8775 and 8776 of Remington and Ballinger's Annotated Codes and Statutes of Washington are hereby repealed.

Passed the House February 25, 1921.

Passed the Senate March 2, 1921.

Approved by the Governor March 8, 1921.

Exhibit C.

TREATY OF COMMERCE AND NAVIGATION WITH JAPAN.

(February 21, 1911.)

[Signed at Washington, February 21, 1911; ratification advised by the Senate, with amendment, February 24, 1911; ratified by the President March 2, 1911; ratified by Japan March 31, 1911; ratifications exchanged at Tokyo April 4, 1911; proclaimed April 5, 1911.]

The President of the United States of America and His Majesty the Emperor of Japan, being desirous to strengthen the relations of amity and good understanding which happily exist between the two nations, and believing that the fixation in a manner clear and positive of the rules which are hereafter to govern the commercial intercourse between their respective countries will contribute to the realization of this most desirable result, have resolved to conclude a Treaty of Commerce and Navigation for that purpose, and to that end have named their Plenipotentiaries, that is to say:

The President of the United States of America, Philander C. Knox, Secretary of State of the United States; and

His Majesty the Emperor of Japan, Baron Yasuya Uchida, Jusammi, Grand Cordon of the Imperial Order of the Rising Sun, His Majesty's Ambassador Extraordinary and Plenipotentiary to the United States of America;

Who, after having communicated to each other their respective full powers, found to be in good and due form, have agreed upon the following articles:

ARTICLE I.

The citizens or subjects of each of the High Contracting Parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally

to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established.

They shall not be compelled, under any pretext whatever, to pay any charges or taxes other or higher than those that are or may be paid by native citizens or subjects.

The citizens or subjects of each of the High Contracting Parties shall receive, in the territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or may be granted to native citizens or subjects, on their submitting themselves to the conditions imposed upon the native citizens or subjects.

They shall, however, be exempt in the territories of the other from compulsory military service either on land or sea, in the regular forces, or in the national guard, or in the militia; from all contributions imposed in lieu of personal service, and from all forced loans or military exactions or contributions.

ARTICLE II.

The dwellings, warehouses, manufactories and shops of the citizens or subjects of each of the High Contracting Parties in the territories of the other, and all premises appertaining thereto used for purposes of residence or commerce, shall be respected. It shall not be allowable to proceed to make a domiciliary visit to, or a search of, any such buildings and premises, or to examine or inspect books, papers or accounts, except under the conditions and with the forms prescribed by the laws, ordinances and regulations for nationals.

ARTICLE III.

Each of the High Contracting Parties may appoint Consuls General, Consuls, Vice Consuls, Deputy Consuls and Consular Agents in all ports, cities and places of the other, except in those where it may not be convenient to recognize such officers. This exception, however, shall not be made in regard to one of the Contracting Parties without being made likewise in regard to all other Powers.

Such Consuls General, Consuls, Vice Consuls, Deputy Consuls and Consular Agents, having received exequaturs or other sufficient authorizations from the Government of the country to which they are appointed, shall, on condition of reciprocity, have the right to exercise the functions and to enjoy the exemption and immunities which are or may hereafter be granted to the consular officers of the same rank of the most favored nation. The Government issuing exequaturs or other authorizations may in its discretion cancel the same on communicating the reasons for which it thought proper to do so.

ARTICLE IV.

There shall be between the territories of the two High Contracting Parties reciprocal freedom of commerce and navigation. The citizens or subjects of each of the Contracting Parties, equally with the citizens or subjects of the most favored nation, shall have liberty freely to come with their ships and cargoes to all places, ports and rivers in the territories of the other which are or may be opened to foreign commerce, subject always to the laws of the country to which they thus come.

ARTICLE V.

The import duties on articles, the produce or manufacture of the territories of one of the High Contracting Parties, upon importation into the territories of the other, shall henceforth be regulated either by treaty between the two countries or by the internal legislation of each.

Neither Contracting Party shall impose any other or higher duties or charges on the exportation of any article to the territories of the other than are or may be payable on the exportation of the like article to any other foreign country.

Nor shall any prohibition be imposed by either country on the importation or exportation of any article from or to the territories of the other which shall not equally extend to the like article imported from or exported to any other country. The last provision is not, however, applicable to prohibitions or restrictions maintained or imposed as sanitary measures or for purposes of protecting animals and useful plants.

ARTICLE VI.

The citizens or subjects of each of the High Contracting Parties shall enjoy in the territories of the other exemption from all transit duties and a perfect equality of treatment with native citizens or subjects in all that relates to warehousing, bounties, facilities and drawbacks.

ARTICLE VII.

Limited-liability and other companies and associations, commercial, industrial, and financial, already or hereafter to be organized in accordance with the laws of either High Contracting Party and domiciled in the territories of such Party, are authorized, in the territories of the other, to exercise their rights and appear in the courts either as plaintiffs or defendants, subject to the laws of such other Party.

The foregoing stipulation has no bearing upon the question whether a company or association organized in one of the two countries will or will not be permitted to transact its business or industry in the other, this permission remaining always subject to the laws and regulations enacted or established in the respective countries or in any part thereof.

ARTICLE VIII.

All articles which are or may be legally imported into the ports of either High Contracting Party from foreign countries in national vessels may likewise be imported into those ports in vessels of the other Contracting Party, without being liable to any other or higher duties or charges of whatever denomination than if such articles were imported in national vessels. Such reciprocal equality of treatment shall take effect without distinction, whether such articles come directly from the place of origin or from any other foreign place.

In the same manner, there shall be perfect equality of treatment in regard to exportation, so that the same export duties shall be paid, and the same bounties and drawbacks allowed, in the territories of each of the Contracting Parties on the exportation of any article which is or may be legally exported therefrom, whether such exportation shall take place in vessels

of the United States or in Japanese vessels, and whatever may be the place of destination, whether a port of the other Party or of any third Power.

ARTICLE IX.

In all that regards the stationing, loading and unloading, of vessels in the ports of the territories of the High Contracting Parties, no privileges shall be granted by either Party to national vessels which are not equally, in like cases, granted to the vessels of the other country; the intention of the Contracting Parties being that in these respects the respective vessels shall be treated on the footing of perfect equality.

ARTICLE X.

Merchant vessels navigating under the flag of the United States or that of Japan and carrying the papers required by their national laws to prove their nationality shall in Japan and in the United States be deemed to be vessels of the United States or of Japan, respectively.

ARTICLE XI.

No duties of tonnage, harbor, pilotage, lighthouse, quarantine, or other similar or corresponding duties of whatever denomination, levied in the name or for the profit of Government, public functionaries, private individuals, corporations or establishments of any kind shall be imposed in the ports of the territories of either country upon the vessels of the other, which shall not equally, under the same conditions, be imposed on national vessels in general, or on vessels of the most favored nation. Such equality of treatment shall apply reciprocally to the respective vessels from whatever place they may arrive and whatever may be their place of destination.

ARTICLE XII.

Vessels charged with performance of regular scheduled postal service of one of the High Contracting Parties, whether belonging to the State or subsidized by it for the purpose, shall

enjoy, in the ports of the territories of the other, the same facilities, privileges and immunities as are granted to like vessels of the most favored nation.

ARTICLE XIII.

The coasting trade of the High Contracting Parties is excepted from the provisions of the present Treaty and shall be regulated according to the laws of the United States and Japan, respectively. It is, however, understood that the citizens or subjects of either Contracting Party shall enjoy in this respect most-favored-nation treatment in the territories of the other.

A vessel of one of the Contracting Parties, laden in a foreign country with cargo destined for two or more ports of entry in the territories of the other, may discharge a portion of her cargo at one of the said ports, and, continuing her voyage to the other port or ports of destination, there discharge the remainder of her cargo, subject always to the laws, tariffs and customs regulations of the country of destination and, in like manner and under the same reservation, the vessels of one of the Contracting Parties shall be permitted to load at several ports of the other for the same outward voyages.

ARTICLE XIV.

Except as otherwise expressly provided in this Treaty, the High Contracting Parties agree that, in all that concerns commerce and navigation, any privilege, favor or immunity which either Contracting Party has actually granted, or may hereafter grant, to the citizens or subjects of any other State shall be extended to the citizens or subjects of the other Contracting Party gratuitously, if the concession in favor of that other State shall have been gratuitous, and on the same or equivalent conditions, if the concession shall have been conditional.

ARTICLE XV.

The citizens or subjects of each of the High Contracting Parties shall enjoy in the territories of the other the same protection as native citizens or subjects in regard to patents, trademarks and designs, upon fulfiillment of the formalities prescribed by law.

ARTICLE XVI.

The present Treaty shall, from the date on which it enters into operation, supersede the Treaty of Commerce and Navigation dated the 22nd day of November, 1894; and from the same date the last-named Treaty shall cease to be binding.

ARTICLE XVII.

The present Treaty shall enter into operation on the 17th of July, 1911, and shall remain in force twelve years or until the expiration of six months from the date on which either of the Contracting Parties shall have given notice to the other of its intention to terminate the Treaty.

In case neither of the Contracting Parties shall have given notice to the other six months before the expiration of the said period of twelve years of its intention to terminate the Treaty, it shall continue operative until the expiration of six months from the date on which either Party shall have given such notice.

ARTICLE XVIII.

The present Treaty shall be ratified and the ratifications thereof shall be exchanged at Tokyo as soon as possible and not later than three months from the present date.

In witness whereof, the respective Plenipotentiaries have signed this Treaty in duplicate and have hereunto affixed their seals.

Done at Washington the 21st day of February, in the nineteen hundred and eleventh year of the Christian era, corresponding to the 21st day of the 2nd month of the 44th year of Meiji.

PHILANDER C. KNOX. (Seal)
Y. UCHIDA. (Seal)

And whereas, the advice and consent of the Senate of the United States to the ratification of the said Treaty was given with the understanding "that the treaty shall not be deemed to repeal or affect any of the provisions of the Act of Congress entitled 'An Act to Regulate the Immigration of Aliens into the United States,' approved February 20th, 1907";

And whereas, the said understanding has been accepted by the Government of Japan;

And whereas, the said Treaty, as amended by the Senate of the United States, has been duly ratified on both parts, and the ratifications of the two Governments were exchanged in the City of Tokyo, on the fourth day of April, one thousand nine hundred and eleven;

Now, therefore, be it known that I, WILLIAM HOWARD TAFT, President of the United States of America, have caused the said Treaty, as amended, and the said understanding to be made public, to the end that the same and every article and clause thereof may be observed and fulfilled with good faith by the United States and the citizens thereof.

In testimony whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this fifth day of April in the year of our Lord one thousand nine hundred and eleven, and of the Independence of the United States of America the one hundred and thirty-fifth.

(Seal) WM. H. TAFT.

By the President:

P. C. KNOX, Secretary of State.

DECLARATION.

In proceeding this day to the signature of the Treaty of Commerce and Navigation between Japan and the United States the undersigned, Japanese Ambassador in Washington, duly authorized by his Government, has the honor to declare that the Imperial Japanese Government are fully prepared to maintain with equal effectiveness the limitation and control which they have for the past three years exercised in regulation of the emigration of laborers to the United States.

Y. UCHIDA.

February 21, 1911.

By the President of the United States of America.

A PROCLAMATION.

Whereas a Protocol of a provisional tariff arrangement between the United States of America and the Empire of Japan was concluded and signed by their respective Plenipotentiaries at Washington, on the twenty-first day of February, one thousand nine hundred and eleven, the original of which Protocol, being in the English language, is, as amended by the Senate of the United States, word for word as follows:

PROTOCOL.

The Government of the United States of America and the Government of Japan have, through their respective Plenipotentiaries, agreed upon the following stipulation in regard to Article V of the Treaty of Commerce and Navigation between the United States and Japan signed this day to replace on the 17th of July, 1911, the Treaty of the 22nd of November, 1894:

Pending the conclusion of a treaty relating to tariff, the provisions relating to tariff in the Treaty of the 22nd of November, 1894, shall be maintained.

In witness whereof, the respective Plenipotentiaries have signed this Protocol in duplicate and have hereunto affixed their seals.

Done at Washington the 21st day of February, in the nineteen hundred and eleventh year of the Christian era, corresponding to the 21st day of the 2nd month of the 44th year of Meiji.

(Seal) PHILANDER C. KNOX.
(Seal) Y. UCHIDA.

And whereas, the said Protocol, as amended by the Senate of the United States, has been duly ratified on both parts, and the ratifications of the two governments were exchanged in the City of Tokyo, on the fourth day of April, one thousand nine hundred and eleven;

Now, therefore, be it known that I, William Howard Taft, President of the United States of America, have caused the said Protocol to be made public, to the end that the same and every article and clause thereof, as amended, may be observed and fulfilled with good faith by the United States and the citizens thereof.

In testimony whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this fifth day of April in the year of our Lord one thousand nine hundred and eleven, and of the Independence of the United States of America the one hundred and thirty-fifth.

(Seal) WM. H. TAFT.

By the President:

P. C. KNOX, Secretary of State.

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